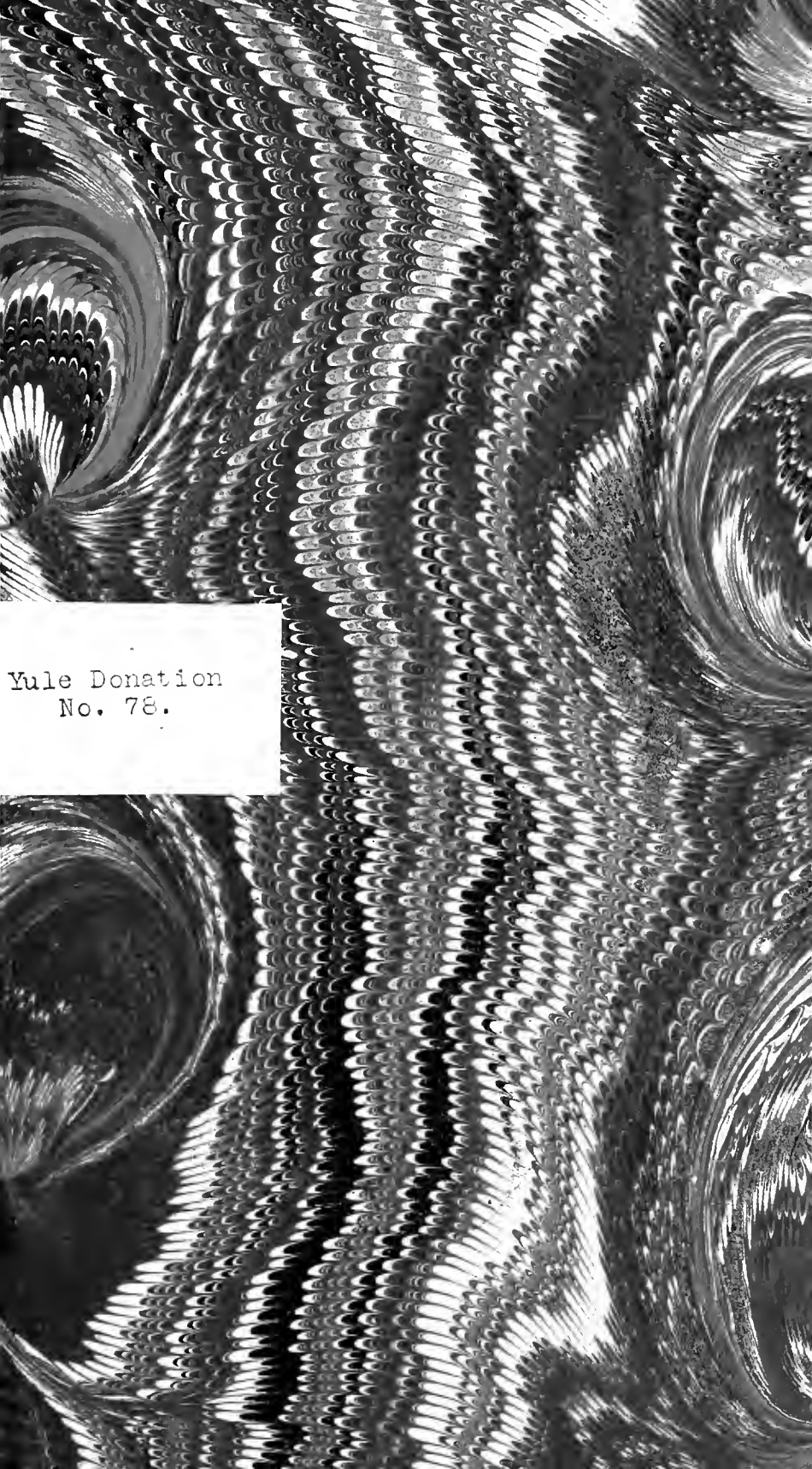

THE

# CASSILLIS PEERAGE.

1760–4.

# CASSILLIS PEERAGE.

Upon the death of John, eighth Earl of Cassillis, in August 1759, his estates devolved, by virtue of a deed of entail executed by him on the 29th day of March preceding, on Sir Thomas Kennedy of Culzean, Bart., the nearest heir-male of the family; but his right was unsuccessfully contested by William Earl of March and Ruglen, grandson of Lady Anne Kennedy, Countess of Ruglen, daughter of John, the seventh Earl of Cassillis, the heir of line. The case was given in favour of the heir-male by the narrowest majority in the Court of Session, and the decision was affirmed by the House of Lords.

The Earl of March, assuming the title of Cassillis, presented a petition to the King, claiming the honours, and Sir Thomas Kennedy made a similar application. Both applications were laid before the House of Peers on the 31st March 1760, and the following Cases were thereafter submitted by Sir Thomas and the Earl to the consideration of their Lordships.

# OF CASSILLIS.

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of Culzean, Second Son. Infeoffment of the Lands
Gilbert, Fourth Earl of Cassillis, *in Person. Tho-
tri*, dated 14th September 1569. 2. Charter, by
Cassillis, to Sir Thomas, designed *dilectum nostrum*
August 1597. 3. Charter of Confirmation thereof
26th August 1597. Died in 1605. Had Issue.

lest Son.
ig him in
n, as Heir
omas, 5th
Died with-

ALEXANDER, afterwards Sir Alexander Kennedy of Culzean, Second Son. 1. Contract between James and Alexander Kennedy, his Brother, 12th June 1622. 3. Charter by James to Alexander, his Brother, 30th July 1622. Died in 1655. Had Issue.

ean. Retour as Heir of Sir Alexander, his Father,
February 1656. Died in 1665.

Y of Culzean, Bart. Retour as Heir of John Ken-
ther, 17th April 1672. Died in 1710.

Culzean, Bart. Retour as Heir of Sir Archibald,
12th March 1711. Died in 1742.

Culzean,
ir of Sir
January
4. No

Sir THOMAS KENNEDY of Culzean, Bart.—THE CLAIMANT.—Retour as Heir of Sir John, his Brother, 12th July 1747.

# THE CASE OF SIR THOMAS KENNEDY

(CLAIMING THE TITLE, HONOUR, AND DIGNITY OF)

# EARL OF CASSILLIS.

*GILBERT KENNEDY*, Grandson of *Robert* III. King of *Scotland*, (by *Mary Steuart*, his Daughter,) was created a Lord of Parliament in 1459, by King *James* II., by the Title of Lord *Kennedy;* and *David*, the Grandson of the said *Gilbert* Lord *Kennedy*, was created Earl of *Cassillis* by King *James* IV. in 1509.

The Title and Dignity of Earl of Cassillis conferred on the Claimant's Ancestor in 1509.

As Patents of Honour were not introduced till long after, in the Reign of *James* VI., these Dignities were conferred by the Sovereign himself in Parliament, without any Writ limiting the Descent of the Honours, or any mention of particular Heirs; and as Service in Parliament, Fidelity and Homage were due in consequence of the Dignity thus conferred, so they have been always understood to be governed by the Rules of the Feudal Law, and to descend uniformly to the Heirs Male of the Person

Which descends as a Male Fief.

first ennobled, unless *Heirs whatsomever*, or Heirs Female, were specially and particularly called to the Succession.

The Estate and Barony of *Cassillis*, before the Creation of *David* the first Earl of *Cassillis*, in 1509, as aforesaid, appears by the following Grants to have been limited to Heirs Male only.

Ancient Investitures of the Estate of Cassillis to Heirs Male. 2d Nov. 1404.

By a Charter in 1404, *Robert* III. King of *Scotland* granted the Lands and Estate of *Cassillis* and others, in the County of *Air*, to Sir *Gilbert Kennedy*, and to *James Kennedy*, his Son, and the *Heirs Male* of his Body; which failing, to *Alexander Kennedy*, his Brother, and the *Heirs Male* of his Body; which failing, to four other Brothers successively, and the *Heirs Male* of their Bodies; which all failing, to the *Heirs Male whatsoever* of Sir *Gilbert*, their Father.

28th Jan. 1405.

And King *Robert* made a Grant in favour of the said *James Kennedy*, then married to *Mary Stuart*, his Daughter, whereby he and *his Heirs Male* are appointed "the Head of the whole Tribe in all "Questions, Articles, and Affairs that could pertain "to the *Kenkynol*," or Head of the Tribe.

2d Aug. 1450.

These two Charters in favour of *James Kennedy* were, of this Date, confirmed by two Charters granted by King *James* II.

13th Feb. 1450.

Who, of this Date, granted a Charter of the said Lands and Estate of *Cassillis* and others, in favour of *Gilbert Kennedy*, Son of the said *James Kennedy*, and Grandson of King *Robert* III., and the *Heirs Male* of his Body; which failing, to *Thomas Kennedy* of *Kirkoswald*, and his *Heirs Male;* which failing, to *Gilbert Kennedy*, *David's* Son, and his

*Heirs Male ;* which failing, to the remanent Persons named in the ancient Charters of the Estate.

By other two Charters of the same Date, King *James* granted the Lands of *Dunnure* and Castle thereof, and other Lands, and also the Custody of the Castle of *Lochdune*, and Lands thereto belonging, to the said *Gilbert Kennedy*, and his *Heirs Male*.

And by a fourth Charter of the same Date, King *James* appointed the said *Gilbert Kennedy*, and his *Heirs Male*, to be the Head of the whole Tribe, and granted to them the heritable Office of Bailie of the Earldom of *Carrick*.

By a Charter in 1501, King *James* IV. granted the Lands and Baronies of *Cassillis* and *Denure*, and others, to *David Kennedy*, (soon after created Earl of *Cassillis*,) upon the Resignation of his Father, *John* Lord *Kennedy*, " Tenen' et habend' " omnes et singulas prædict. terras, &c. dicto " *David Kennedy*, et hæredibus suis de nobis et " successoribus nostris, &c. in feudo et hæreditate, " &c. *secundum tenorem antiquarum infeodationum* " *dict' terrarum eis desuper confect.*" 17th Feb. 1501.

The said *David*, created Earl of *Cassillis* in 1509, was succeeded in his Estate and Honours by his Son *Gilbert*, the second Earl of *Cassillis*, to whom succeeded his Son *Gilbert*, the third Earl of *Cassillis*, who, in 1540, obtained a Charter from King *James* V., granting the whole Estate and Barony of *Cassillis*, and other Lands therein mentioned, to him and the *Heirs Male* of his Body ; which failing, to *Thomas*, his Brother, and the *Heirs Male* of his Body ; which failing, to *David*, *Quintin*, *Archibald*, 6th Feb. 1540.

*Hugh*, and *James Kennedy*, his Brothers, successively, and the *Heirs Male* of their Bodies; which failing, to *James* and *Thomas Kennedy*, his Uncles, successively, and the *Heirs Male* of their Bodies; which failing, to *Hugh Kennedy* of *Girvain Mains*, to *William Kennedy* of *Glentig*, to *Alexander Kennedy* of *Bargeny*, and to *James Kennedy* of *Blarquhan*, successively, and the *Heirs Male* of their respective Bodies; which failing, to the lawful and nearest *Heirs Male whatsoever* of the said *Gilbert* Earl of *Cassillis*, bearing the Name and Arms of *Kennedy*; which all failing, to his nearest and lawful Heirs Female whatsomever.

The Estate and Dignity descended in the Male Line.

The said Estate and Barony, and the Title and Dignity of Earl of *Cassillis*, descended in the Male Line from the said *Gilbert*, the third Earl, to *John*, the eighth Earl of *Cassillis*, who died the 8th of *August*, 1759, without Issue, as appears from the Table of Pedigree hereto annexed.

The Claimant, Sir Thomas Kennedy, served nearest Heir Male of the Family, 28th Jan. 1760.

Upon the Death of the said *John*, late Earl of *Cassillis*, the Claimant, Sir *Thomas Kennedy*, agreeable to the Laws of *Scotland*, was duly served and cognosced, upon the most authentic and indisputable Evidence of Charters, Retours of Services, and Infeoffments, by a sworn Jury of Noblemen and Gentlemen, to be the nearest and lawful Heir Male of the said *John* late Earl of *Cassillis*, lineally descended from Sir *Thomas Kennedy* of *Culzean*, the second Son of *Gilbert*, the third Earl of *Cassillis*, who was Grandson of *David*, first created Earl of *Cassillis* in 1509, as before-mentioned.—The Genealogy and Connection of this Branch of the Family

is likewise contained in the Table hereto annexed, wherein the Proofs are referred to.

Prefers a Petition to his Majesty for establishing his Right.

The Claimant, Sir *Thomas Kennedy*, lately presented a Petition to his Majesty, praying, That the Title and Dignity of Earl of *Cassillis* might be declared to belong to him and his Heirs Male; and his Majesty has been graciously pleased to refer this Petition to the Consideration of the House of Lords.

The Claimant most humbly hopes the foresaid Title and Dignity will be found of Right to belong to him, for the following, among other

## REASONS.

Reasons for declaring the Claimant's Right to the Title of Honour and Dignity of Earl of Cassillis.

I. Feus of Lands anciently, before Charters or Grants in Writing were introduced, were conferred by Investiture, in Presence of the *Pares Curiæ*.—And in the same Manner, until the Reign of *James* VI. of *Scotland*, when Patents appear to have been first introduced, the Dignity of Earl was conferred by the Sovereign himself in Parliament, by Cincture or Girding the Person ennobled with a Sword, and by Proclamation made by Heralds—In Feus of Lands, military Service and Fidelity were due by the Vassals to the Over-Lord or Superior; so in Dignities the Person ennobled was bound to perform Service in Parliament, Fidelity, and Homage—Feus of Lands, before the Descent was limited by Grants in Writing, uniformly descended to Heirs Male, and could not be aliened without the Consent of the Superior; so Dignities conferred by Investiture

in Parliament descended to the Heirs Male of the Body of the Person first ennobled, and could not be aliened or transferred in any other Manner than by Resignation thereof in the Hands of the Sovereign.

II. As the original Constitution of Feus and Dignities was derived from the Feudal Law, every Question, with respect to Dignities, conferred without Patent, must be governed by the Rules of that Law, which has hitherto, and must always be resorted to as the common Law of *Scotland*, where the statutory Law, or a Course of Decisions of the Sovereign Court, has established no certain Rule of Judgment; and, therefore, in the present Case, the Right to the Title and Dignity of the Earl of *Cassillis*, conferred on the Claimant's Ancestor in 1509, can only be judged of by the Feudal Law of *Scotland*, which has ever regulated the Descent of all Dignities, originally conferred by Cincture or Investiture, before any special Grants or Patents were in Use.

Sir Tho. Craig, Lib. 1, Dieg. 8, § 2 and 16.—Lib. 1, Dieg. 10, § 6.—Lib. 2, Dieg. 14, § 3.

III. By the Feudal Law, the Succession of Lands, in all Cases, devolved on Males only, to the entire Exclusion of Females.—This Law was early received in *Scotland;* and long after the *Norman* Conquest, when the Succession of Females was introduced into the Law of *England*, it continued in its original Purity in *Scotland*, and the exclusive Privilege of the Male Succession wore out more slowly and gradually.—At first, Females were entitled to succeed by Paction or express Provision, and were understood to succeed only upon the Failure of Males.—Afterwards, when the Settlements of Estates were made in favour of *Heirs whatsom-*

*ever*, Female Heirs were understood to be comprehended under that general Description; but this can have no Influence on the Succession of Dignities conferred by Cincture in Parliament, which was originally regulated by the Feudal Law; and the Descent once established in the Male Line will not be presumed to be altered, unless such Alteration appears by the clearest Evidence.—The Continuance of the Descent in the Male Line is proved by the History of the several noble Families in *Scotland*, who have possessed these Dignities.—In every Case where the Male Line separated from the Female, the Heir Male was always preferred both in ancient and later Times, which is the strongest Proof that can be had, that the Consuetudinary Law of *Scotland* has, in this Particular, never varied from the Feudal Law, to which it owed its Origin.

IV. It appears that the numerous Resignations of Titles of Honour made in the Hands of the Sovereign, for the Purpose of obtaining new Grants, agreeable to the Law and Usage of *Scotland* before the Union of the Kingdoms, were all uniformly in Favour of *Heirs Female*, and none of them in Favour of Heirs Male; which puts it beyond a Doubt, that *Heirs Male* had ever the *legal* Right of Succession, and that this Right could only be altered or defeated by a Resignation of the Dignity, and a new Grant thereof by the Sovereign limiting the Descent to Heirs *Female*.

V. The ancient Settlements of the Estate of *Cassillis*, in the present Case, in Favour of Heirs Male only, affords a most convincing Proof, that the Title

of Honour and Dignity was by Law understood to descend in the same Channel, as it is not possible to believe that the Persons who enjoyed this Rank and Dignity would for Ages have anxiously conveyed their Estates to Heirs Male, if they had understood that the Dignity could have descended to Heirs Female.

VI. As the Descent of Peerages (originally conferred without Patents) to the nearest Heir Male of the Person first ennobled, has uniformly taken Place in a great Number of the noble Families of *Scotland;* so this Rule of Descent was never called in Question until the Year 1729, in a Dispute before the Court of Session, between *Simon* the late Lord *Lovat*, the undoubted Heir Male of the Person first ennobled in the Year 1540, and *Hugh Fraser*, Esq., the nearest Heir of Line, descended of a Daughter of *Hugh* Lord *Lovat*, who died in 1697.—On Occasion of this Dispute, many Instances of the Descent of Peerages (without Patents) in the Male Line, to the Exclusion of the nearer Heirs Female, were exhibited and proved to the Satisfaction of the Court of Session. And though some Instances were likewise brought, tending to show that such Dignities had sometimes been assumed by the nearest Heir Female, yet the Court, being of Opinion that all Dignities thus conferred before Patents were introduced descended by Law to the nearest Heir
3d July 1730. Male of the Person first ennobled, they found the Title and Honours of Lord *Fraser* of *Lovat* descended to *Heirs Male*, and of Right belonged to the said *Simon* late Lord *Lovat*, as Heir Male of the Family of Lord *Fraser* of *Lovat*.—This Judg-

ment was acquiesced in, and has stood unimpeached for thirty Years; and the said *Simon* late Lord *Lovat* having as a Peer of *Scotland* been impeached, brought to a Trial, and convicted of High Treason for his Accession to the Rebellion 1745, the Law in this Particular must now be considered as established, and cannot be called in Question.

*Objection I.*

It may be objected, That by the Law and Usage of *England*, Dignities as well as Lands, unless limited by special Grant, always descend to the right Heirs, or Heirs of Line, and consequently to Heirs Female; and that this Rule ought to take Place in the present Case.

*Answer.*

To this it is answered, That the Feudal Law was only introduced into *England* at the *Norman* Conquest; and at the same Time the Female Succession was established agreeable to the *Norman* Custom.—But it appears from the Laws of *Malcolm* the IId, who reigned in 1004, and from the most undoubted Authorities, that the Feudal Law, by which the Female Succession was excluded, took Place much earlier, and continued much longer in its original Purity in *Scotland*, where it has ever been considered as the proper Law of that Country in Matters of Succession, unless where it has been clearly altered by Custom, which will not be maintained in the present Case.

Leges Malcolumbi 2di, cap. i. Reg. Majestat.

Sir Tho. Craig, Lib. i Dieg. 8, § 2 and 16.

Hoc enim certissimum est, nos purius hoc jus habere quam vicinos.—Hoc jus proprium hujus Regni dici potest, cum ex ejus scaturigine et fontibus omne jus, quo hodie utimur in foro, omnisque usus et praxis defluxerit; et si quid dubii oriatur, origines semper repetendæ sunt, ut inde quod æquum est dignoscatur.

*Objection II.*

It may be further objected, That there occurred one Instance of the contested Right to the Title and Dignity of Lord *Oliphant* in 1633, where the Court of Session found, That where the Person last

Durie's Decisions, 11th July 1633. Oliphant against Oliphant.

deceased had no Male Children, and where there was no Writ extant to exclude the Female, Use was sufficient, conform to the Laws of *Scotland*, to transmit such Title to the Heir Female.

*Answer.* But this extraordinary Case, said to have been determined in Presence of King *Charles* the Ist, being very indistinctly reported, without any Mention of the original Constitution of the Peerage, or any Traces of such Dispute appearing from the Records, can have no Influence in the present Case.—The Question appears to have been only with Respect to a Resignation of the Title and Dignity made by Lord *Oliphant*, in Favour of *Patrick Oliphant*, his Heir Male, which was never accepted of by the King.—The Court of Session, on this Occasion, as the Report sets forth, FOUND, That Usage was sufficient to transmit the Title to the Heir Female; but no Reason is given for this Determination, nor was this any Part of the Question: And the Report adds, with respect to the real Question before the Court, That the Lords FOUND, "That the Heir Female, the Daughter of the last Lord *Oliphant*, was excluded as not having Right to this Dignity, seeing the King had not conferred the same upon her, and her Father had renounced his Right thereto, which, though not sufficient to establish the Right in Favour of the Donee, yet was sufficient to denude the Resigner and his Descendants, until the King should declare his Pleasure; and they found that none of the Parties could claim the said Honour, but that it remained with the King."

William Earl of March prefers a Petition to his

*William* Earl of *March* and *Ruglen* likewise presented a Petition to his Majesty, (which has been

referred to the House of Lords,) claiming the foresaid Title and Dignity of Earl of *Cassillis*, as nearest Heir General, or of Line, of *David*, the first Earl of *Cassillis*, being the Great-Grandson of *John*, the seventh Earl of *Cassillis*, by *Anne*, Countess of *March*, the Daughter of *Anne*, Countess of *Ruglen*, who was the eldest Daughter of the said *John* Earl of *Cassillis*.

Majesty, claiming the foresaid Title of Honour and Dignity.

I. The said *William* Earl of *March* insists, that where no Patent exists, the Descent of the Title of Honour is regulated by that of the Family Estate, as it stood devised by the Investitures at the Time the Dignity was conferred; and that, when the Title of Honour and Dignity was first conferred on the Family of *Cassillis* in 1509, the Estate was settled in Favour of Heirs General, or Heirs of Line, as appeared by the following Writings.

1st Proposition on which the Claim of William Earl of March is founded.

1. Charter to *David Kennedy*, Knight, Son and apparent Heir of *John* Lord *Kennedy*, of the Office of Bailiary of *Carrick*, with the Pertinents. "Tenend' prædicto David Kennedy militi *et hæredibus suis*."

9th July 1489.

2. Charter of the same Date to the said *David*, and *Agnes Borthwick*, his Spouse, of the Lands of *Balgra*. "Tenend' præfatis David et Sponsæ suæ, "et eorum alteri diutius viventi in conjuncta infeodatione et heredibus suis inter ipsos legitimè procreandis; quibus forte deficientibus, legitimis et "propinquioribus hæredibus dicti Joannis Domini "Kennedy sui patris quibuscunque."

9th July 1489.

3. Charter before-mentioned in Favour of the said *David*, of the Baronies of *Cassillis* and *Denure*. "Tenend' dict' David et hæredibus suis de

17th Feb. 1501.

"nobis et successoribus nostris, &c. in feodo et "hæreditate, &c. *secundum tenorem Antiquarum* "*Infeodationum dict' terrarum eis desuper con-* "*fect.*"

12th Feb. 1505. 4. Charter in Favour of *John* Lord *Kennedy*, of the Lands of *Coiff*. "Tenend' dict' Joanni "Domino Kennedy et *hæredibus suis.*"

30th March 1506. 5. Charter in Favour of *David*, Son and Heir apparent of *John* Lord *Kennedy*, of the Lands and Barony of *Leswalt*. "Tenend' dict' David Ken- "nedy et *hæredibus suis.*"

28th Jan. 1506. 6. Charter in Favour of the said *David*, of the Lands of *Mackwardstoun*. "Tenend' dict' David "et *hæredibus suis.*"

5th Feb. 1511. 7. Charter granting to *David* Earl of *Cassillis*, Lord *Kennedy*, et "*hæredibus suis*," the Castle and Barony of *Cassillis*, and Lands of *Macmartinston* and others.

20th July 1536. 8. Charter to *Gilbert* Earl of *Cassillis*, of the Lands of *Balmacawell*, which are thereby annexed to the Barony of *Cassillis*, "Tenend' dict' *Gilberto* "*comite* de *Cassillis* et *hæredibus suis.*"

But that these Charters cannot avail the Claimant, the Earl of *March*, in his Argument with respect to the Settlement of the Family Estate, will appear from the following Considerations.

Answers to the first Proposition on which the Earl of March's Claim is founded. 1. As the Charter in favour of *David Kennedy*, in 1501, expressly specifies, That the Estate is to be holden by his Heirs, *secundum tenorem antiquarum infeodationum eis desuper confect.* it can only be understood to mean the Heirs of the former Investitures, which are proved to have been in Favour of *Heirs Male* only.

2. The two Charters in 1489, of the Bailiary of *Carrick*, and Lands of *Balgra;* the Charter in 1505, of the Lands of *Coiff;* the Charter in 1506, of the Lands of *Leswalt;* the other Charter in the same Year, 1506, of the Lands of *Macwardston*, are all of them Grants of inconsiderable Parcels of Lands, separate and distinct from the Barony of *Cassillis*, and have long since been aliened and gone from the Family: And even admitting the general Destination of *Heirs*, as contained in these Charters, included Female Heirs, yet most certainly the temporary Grants of these detached Parcels of Land cannot influence the Succession of the Family Estate, which, at that time, was indisputably limited to Heirs Male only.

3. The Charters in 1511 and 1536, being subsequent to the Time the Dignity was first conferred on *David* Earl of *Cassillis*, in 1509, they can have no Influence in varying the Descent of the Title of Honour. But it will appear, the Words *hæredibus suis*, contained in these Grants, did then only mean the Heirs of the former Investitures; and there can be no Reason to construe them otherwise: Because the Lands in the Charter 1536 are thereby annexed to the Barony of *Cassillis*, and most certainly will be understood to descend to the same Heirs Male who succeeded to that Barony.

4. There is demonstrative Evidence, that there was no Intention of altering the Course of Succession by the general Words *hæredibus suis* contained in these Charters; for it appears, that *Gilbert* Earl of *Cassillis*, a few Years after, in 1540, obtained a Charter of his whole Lands and Estate, then of new

erected into one entire Barony, in Favour of the *Heirs Male* of his own Body; and failing these, in Favour of six Brothers successively, and their *Heirs Male;* which failing, to his two Uncles and their *Heirs Male;* which failing, to several other *Heirs Male* therein named; which failing, to his *own Heirs Male whatsomever:* And last of all, to prevent the Crown's taking the Estate through default of Heirs, to his Heirs Female whatsomever.

2d Ground on which the Earl of March's Claim is founded.

II. The Claimant, the Earl of *March*, further insists, that, agreeable to the Usage and Practice of *Scotland*, the Title and Dignity of Earl of *Cassillis* was resigned along with the Family Estate in the Hands of the Crown; and thereupon two several Grants were made, limiting the Descent of the Honours to a particular Line of Heirs, whereby the Claimant was entitled to take and enjoy the same, as Great-Grandson of *John*, the seventh Earl of *Cassillis*, the Grantee of these Charters, by his eldest Daughter *Anna* Countess of *Ruglen*, all the Male Issue of his Body being extinct. And in support of this Plea, he refers to the two following Charters.

29th Sept. 1642.

1st, Charter under the Great Seal, proceeding upon the Procuratory and Deed of Resignation executed by *John*, the sixth Earl of *Cassillis*, whereby he resigned in the Hands of His Majesty's Commissioners, the Barons of Exchequer, *the Earldom and Lordship* of *Cassillis*, comprehending the Lands therein particularly named and described, for new Infeoffment thereof to be given and granted to the said *John* Earl of *Cassillis* in Liferent, and *James* Lord *Kennedy*, his eldest Son, and the Heirs Male

of his Body; which failing, to return to the said *John* Earl of *Cassillis*, and the other Heirs Male of his Body; which failing, to the Daughters of Lord *Kennedy*, without Division, and the Heirs Male and Female of their Bodies; which failing, to the Daughters of the said *John* Earl of *Cassillis*, without Division, and the Heirs Male and Female of their Bodies; which failing, to the Earl's Heirs Male whatsoever; which failing, to his Heirs and Assignees whatsoever. And the Charter contains a *novodamus* and Erection of *the Lands and Estate*, "In unum integrum et liberum *Comitatum et Do-* " *minium*, nunc, et in omni tempore, *Comitatum et* " *Dominium* de Cassills nuncupand. per dict' Co- " mitem de Cassils, duran' vita sua, et post ejus " decessum per præfat. Jacobum Dominium Ken- " nedy ejus filium, et hæredes suos respective ante- " dict' *secundum præcedentiam et prioritatem loci* " *illis per eorum jura legesque et praxin dicti reg-* "*ni nostri Scotiæ debitam et competentem*, omni " tempore affuturo, fruen. gauden. et possiden."— And this Charter was ratified in the Parliament immediately following.

2d Charter under the Great Seal, proceeding upon the Procuratory of Resignation contained in the Contract of Marriage, dated 26th of *December* 1668, executed between *John* the seventh Earl of *Cassillis*, and Lady *Susan Hamilton*, Daughter of *James* Duke of *Hamilton*, whereby the said *John* Earl of *Cassillis* resigned *the Lands and Barony* of *Cassillis*, comprehending the particular Lands and others therein mentioned, all united into one whole and free *Earldom*, called the *Earldom of*

*Cassillis*, in the Hands of his Majesty, or his Commissioners, in Favour, and for new Infeoffment to be made and granted to the said *John* Earl of *Cassillis*, and the Heirs Male of his Body; which failing, to the eldest Heir Female of the said Marriage, without Division; which failing, to the Sisters of the said Earl successively, and the Heirs Male of their Bodies; which failing, to his nearest Heirs Male; which failing, to his Heirs and Assignees whatsoever.—This Charter contains a Reference to the former Charter passed in 1642, in these Words:—"Quæ Integræ Terræ, Baroniæ, &c. sunt omnes "unit. prius annexat. erect. et incorporat. in unum "integrum et liberum Comitatum et Dominium nun- "cupat. et nuncupand. omni tempore affuturo Comi- "tatum et Dominium de Cassils, *cum titulo, digni- "tate, præcedentia, et prioritate dict. Comiti et "predecessoribus suis, per leges et praxin hujus "regni nostri debit. secundum cartam per quondam "nostrum, carissimum patrem Carolum primum, "Regem beatissimæ memoriæ, sub suo magno "sigillo hujus regni nostri Scotiæ concess.* de data "penult. die Septembris 1642."—And it contains likewise a new Erection of the Lands, "in unum "integrum et liberum Comitatum et Dominium, "nuncupat. et nuncupan. nunc et in omni tempore fu- "turo, Comitatum et Dominium de Cassillis, fruend. "gaudend. et possidend. per prefatum Joannem "Comitem de Cassils, ac per hæredes suos masculos "provisionis et talliæ respective antedict. *secundum "precedentiam et prioritatem loci ipsis debit. et "competen.* per eorum jura et per leges dict. hujus "Regni nostri Scotiæ, omni tempore futuro."—A

Ratification of this Charter likewise passed as usual in the Parliament 1672.

But that these Charters and Ratifications thereof can have no Effect to alter the legal Descent of the Title of Honour and Dignity of Earl of *Cassillis* from the Heir Male of the Family, will appear from the following Considerations:—

Answers to the 2d Proposition, on which the Earl of March's Claim is founded.

1. It appears by the Procuratory of Resignation, upon which the Charter 1642 proceeded, that the Title of Honour and Dignity was not resigned by the Earl of *Cassillis* in the Hands of the Crown, and of consequence no new Limitation could be made, or was intended, by this Grant.

2. It appears by the Signature or Warrant of the Charter in the Records of Exchequer, that it was not superscribed by the King, which was indisputably necessary; and accordingly the Charter was only granted by *the Lords of Exchequer*, who had no Power to receive Resignations, or make new Grants of Titles of Honour.

3. The Charter 1671 proceeds upon the Procuratory of Resignation contained in the Marriage Settlement between *John* Earl of *Cassillis* (the Son of the former Earl *John*, who obtained the Charter 1642) and Lady *Susan Hamilton*. And as there is no Warrant for resigning the Dignity, nor is it once mentioned in the Marriage Settlement, most certainly no Alteration could be made of the Descent of the Title of Honour. For though Resignations of this kind are peculiar to *Scotland*, yet no Instance ever occurred of a new Limitation made of Honours *without a special Resignation;* nor can it, without Absurdity, be supposed that the King

would alter or impair a Right vested in a Subject, without his special Consent.

4. As the *Lands and Estate* were only resigned by the Earl of *Cassillis*, so the Docquet subjoined to the original Signature, which is intended as a Cheque to prevent Grants by Subreption, contains a special Description of the whole Lands and the Substitution of Heirs, but does not once mention *the Title of Honour or Dignity*.

5. The Words of the Charter 1642, or of the Charter 1671, cannot, by the most strained Construction, import the Grant of a Title of Honour.—The Erection of the Lands, by both these Charters, into a *Lordship and Earldom*, to be possessed by the Earl of *Cassillis* and his Heirs, "*according to* "*the Precedency and Priority of Place due and* "*competent to them by their Rights, and the Laws* "*and Practice of* Scotland," can most certainly confer nothing more than the common territorial Jurisdiction belonging to Lands thus distinguished by the Name of a Lordship and Earldom, and are only the Work of the Attorney who formed the Signature, without any Warrant from the Procuratories of Resignation.

6. The Ratifications of these Charters in Parliament passed of Course, and were considered as Matter of mere Form. They were neither read in Parliament, or passed as other Acts, nor do they contain any more than a general Confirmation of the Charters themselves; which, as has been already shown, do not comprehend the Title of Honour or Dignity in question.

WHEREFORE, as the Claimant Sir *Thomas Kennedy* is the undoubted Heir Male of the Family of *Cassillis*, lineally descended from the Person first ennobled in 1509.—As it appears from the most undoubted Authorities, that the Descent of Titles of Honour conferred without Patent, must be regulated by the Feudal Law, which always preferred the Succession of Heirs Male, so long as any existed.—As it appears by a Variety of Instances in many noble Families of *Scotland*, that Peerages without Patent did in fact descend to a distant Heir Male where a nearer Heir Female existed.—As it appears that Female Heirs were never entitled to such Dignities, but upon a Resignation and a new Grant thereof by the Sovereign, which was the only Method of defeating the *legal* Succession of the Heir Male.—As by the Settlement of the Estate in Favour of Heirs Male, and the continued Descent thereof in that Line, there arises the strongest presumptive Evidence, that by Law the Title of Honour was understood to descend to the same Heirs Male.—And as it appears that no Resignation or new Grant of this Dignity of Earl of *Cassillis* was ever made in Favour of Heirs Female, IT IS MOST HUMBLY HOPED the said Dignity will be found of Right to belong to the Claimant, Sir *Thomas Kennedy*.

C. YORKE.
CH. HAMILTON GORDON.

# THE CASE OF WILLIAM EARL OF RUGLEN AND MARCH,

(CLAIMING THE TITLES AND DIGNITIES OF)

# EARL OF CASSILLIS AND LORD KENNEDY.

First Creation of the Honours of Lord Kennedy and Earl of Cassillis.

*GILBERT KENNEDY*, Grandson of King *Robert* III. of *Scotland*, was, in the Reign of King *James* II., created Lord *Kennedy;* and his Grandson *David* Lord *Kennedy* was, about the year 1509, created Earl of *Cassillis*.

There is no Patent on Record of these Creations extant; but there is complete Evidence of them from the Rolls of Parliament and from ancient Papers; which Instruments likewise show that after the Family of *Kennedy* was ennobled, their Estate was from time to time settled, not upon the Heirs Male, but the Heirs General.*

Charters. To Heirs in general.

* The Instruments are—

1. A Charter under the Great Seal of the Lands of *Balgrae*, resigned by *John* (called therein) Lord *Kennedy*, to Sir *David Kennedy*, his Son and apparent Heir; and the Limitation of the Lands in this Charter is to the *Heirs* to be procreat of the Marriage between him and *Agnes Borthwick*, his Wife; whom failing, to *the nearest and lawful Heirs whatsoever* of the said *John* Lord *Kennedy*. This Charter is dated the 9th *July* 1489.

Charter of Resignation in 1671.

The Titles of Earl of *Cassillis* and Lord *Kennedy*, being come by a regular Course of Succession in the Male Line to *John* the seventh Earl, he, upon his own Resignation, obtained a Charter under the Great Seal, (warranted by a Signature under the King's Hand, dated at *Whitehall*, 24th *April* 1671,) whereby the King gives and grants to the said Earl of *Cassillis*, and the Heirs Male of his Body; whom failing, to the Heirs Female of his Body, without Division, *(Heredes Femellæ respective predict. omni modo, viro nobili vel generoso qualificato Cognomine de* Kennedy *nuben., saltem, uno, qui et heredes inter illos legitime procreand. ad Terras et Statum Subscript. Virtute hujus presentis Talliæ et Provisionis Succeden. assument, suscipient, ferent, gerent et utentur, omni Tempore futuro Cognomine de* Kennedie, *Armis et* Dignitate *Familiæ de* Cassillis,) with Divers other

2. A Charter of the same Date, upon the Resignation likewise of *John* Lord *Kennedy*, of the Office of Bailiff of *Carrick*, to his Son *Sir David and his Heirs*.

3. A Charter upon the like Resignation, of the Lands and Baronies of *Cassillis* and *Dunure*, to his Son Sir *David and his Heirs*. This Charter is dated the 17th *February* 1501.

4, 5, 6. Besides these, there is a Charter of the Lands of *Coiff* to *John* Lord *Kennedy*, dated 12th *February* 1505; and a Charter of the Lands of *Markwardstone* to Sir *David Kennedy* and his Heirs, dated 12th *January* 1506; and also a Charter of the Barony of *Leswalt* to the same Sir *David Kennedy;* and the Limitation in all these is the same as above, to *Heirs* in general.

7. A Charter of the Lands and Barony of *Cassillis*, with several other Lands, to *David* Earl of *Cassillis* Lord *Kennedy*, the Limitation to the said *David* and *his Heirs*. This Charter is dated 5th *February* 1511.

By the Exchequer Rolls for 1509, it appears that the said *David* is only marked Lord *Kennedy;* but in the Roll dated 10th *August* 1510, he is marked Earl of *Cassillis*.

Remainders, over the Earldom and Lordship of *Cassillis*, to be bruiked, enjoyed, and possessed by the said *John* Earl of *Cassillis*, and by his Heirs Male, and of Provision and Tailzie, respectively foresaid, *conform to the Precedency and Priority of Place due and competent to them by their Rights, and Laws and Practice of this Kingdom;* and this Charter was ratified in Parliament *Anno* 1672.

Descent of the Titles to the Earl of March.

This *John* Earl of *Cassillis* had issue a Son, *John* Lord *Kennedy*, who died in his Father's Life, leaving Issue only one Son, *John*, the last Earl of *Cassillis;* and a Daughter, Lady *Anne*, married to *John* Earl of *Ruglen*, by whom she had Issue one Son, who died unmarried, and two Daughters, *Anne* Countess of *March* and *Ruglen*, and *Susan*, now Countess Dowager of *Cassillis*.

By the Death of the last Earl of *Cassillis* without Issue, in 1759, the Earl of *March* became entitled to the Honours and Dignities of Earl of *Cassillis* and Lord *Kennedy*, as descended from the eldest Daughter of *John* the seventh Earl of *Cassillis*, to whom the Honours were limited by the Charter of 1671, or as Heir at Law of the Earls of *Cassillis* and Lords *Kennedy;* and preferred a Petition to his Majesty, claiming the said Titles to be allowed him.

Sir *Thomas Kennedy* having likewise petitioned, claiming these Titles by Descent to him as Heir Male, his Majesty has been graciously pleased to refer both to the House of Peers.

Claim of the Earl of March. 1st, Upon the Charter of 1671.

The Earl of *March's* Right is founded, in the first Place, upon the Charter of 1671; for if that Charter operates as a new Grant from the Crown

of the Title and Dignity of Earl of *Cassillis*, with the ancient precedency, there is no room for any Question as to the Descent of the Right to the Ancient Peerage.

The following Propositions are submitted in support of his Claim, as founded upon that Charter :—

1. That the Earl of *March*, as Great-Grandson of Earl *John*, by his Daughter the Countess of *Ruglen*, is the Heir, to whom the Rights conveyed by that Charter have descended, on failure of the said Earl *John's* Issue Male in the Person of the last Earl.

2. That by the Law and Usage of *Scotland*, a Grant of a Title of Honour upon a Resignation *in favorem*, did effectually convey the ancient Title to the Heirs therein mentioned. This was proved by the Instances of the Practice of *Scotland* in such Cases, quoted upon the Claim of the Peerage of *Stair*, and is now established by the Determination of the House of Lords upon that Case in 1748.

3. That by the express Words of this Charter of 1671, the Title and Dignity of Earl of *Cassillis* is conveyed. The Charter, it is true, does also convey the Lands of the Earldom and Lordship of *Cassillis*. But it was usual in *Scotland* for Charters to contain a Conveyance, both of the Lands and Honours of the Person upon whose Resignation they passed, especially where (as in the present Case) the Lands were united and erected into an Earldom or Lordship; and that the Title of Honour, as well as the Lands and Earldom, were meant to be granted by this Charter to Heirs Female on

Failure of Male of the Grantee's Body, is evident from the Condition of bearing the Arms *and Dignity* of *Cassillis* annexed to the Limitation in Favour of Heirs Female, and from the Grant of the Earldom, " To be enjoyed and possessed by the said " Earl of *Cassillis* and his Heirs aforesaid, conform " to the Precedency and Priority of Place due and " competent to them by their Rights, Laws and " Practice of this Kingdom;" Words which can have no meaning as applied to a Grant of Lands, but plainly imply the Grant of a Title of Honour, to which only they are applicable: And it is farther evident from the Circumstance of a Signature under the King's Hand, having issued as the Warrant of this Charter, which was necessary where a Title of Honour was to be conveyed, but not at all so for a Grant of Lands only.

2d, As lineal Heir of the old Peerage.

But if this Charter should be held not to operate as a Grant of the Title of Honour, then the Earl of *March* claims the Titles of Earl of *Cassillis* and Lord *Kennedy*, as descended upon him the Lineal Heir, by the Law and Course of Descent of Peerages created without special Limitations.

By the most ancient Usage of *Scotland*, the Dignities of Earldoms and Lordships were Territorial, and the Title was annexed to the Land. In course of Time they became personal and inherent in the Blood of the Person ennobled. And at this Period there were two Methods by which the Crown could create a Man, an Earl or Lord of Parliament; the one was in analogy to the ancient territorial Dignities, by a Charter granting Lands erected into

an Earldom or Lordship, with the Dignity of Earl or Lord, to the Grantee, with such Limitations of Heirs as the King pleased. The other was by a Solemnity of Creation performed in full Parliament, *per Cincturam Gladii*, and other Ceremonies; and an Entry of this Creation was made in the Rolls of Parliament.*

This being premised, the following Propositions are submitted in support of the Earl of *March's* Claim, as founded upon his Right, by Descent and Lineal Heirship, to the Titles of Earl of *Cassillis* and Lord *Kennedy*.

1. That these Titles were originally established by Creation in Parliament, without any Patent or Grant expressing any Limitation of the Descent of the Honour.

The Proof of this is, that the Lands of *Cassillis* were not erected into an Earldom till 1642, in which Year there is a Charter uniting and erecting them into an Earldom. The older Charters convey no Dignity, but merely the Lands. Patents of Honour

* Sir *George M'Kenzie*, in his Treatise of Precedency, c. 8, mentions Peerages by feudal Erection, and by Patent of Honour; and adds, "A third Way of Nobilitating with us is by Creation and "solemn Investiture," and then mentions the Form used in the Creation of the Marquisses of *Hamilton* and *Huntly*.

This Method of Creation is mentioned in an Entry in the Parliament Rolls of the Creation of *Patrick* Lord *Hales* to be Earl of *Bothwell* in 1487, "Ipsumque Dominum Patricium in Comitem creavit, et "Comitis Titulo decoravit per præcinctionem Gladii, ut mos est, ita "quod ipse, et sui heredes, pro perpetuo futuris temporibus Comites "de Bothwell vocentur, Comitisque dignitate fulgeant." The Entry of the Creation of a Peer is seldom so full as this, for commonly it is but a note of the Creation; as in the Lord *Hume's* Case, the Entry is only in these Terms:—"2 *Augusti* 1473, Quo die, *Alexander Hume*, "de eodem Miles, factus fuit Dominus Parliamenti."

were first introduced in the Reign of *James* VI., which began in 1567. As, therefore, the Title of Earl of *Cassillis* is clearly as ancient as 1510, it could not be by Patent, neither was it granted by Charter, and must, therefore, have its Original from a Creation in Parliament.

2. A Creation in Parliament gave the Person ennobled an Estate of Inheritance in the Honour.

Of this there can be no Dispute, since the Succession of most of the ancient Peerages has proceeded upon that Ground alone.

3. This Estate is descendible according to the ordinary Course by which every other Right of Inheritance descends, and therefore will descend to the Daughters and their Issue, on failure of Issue of the Sons.

The Presumption is in Favour of the Truth of this Proposition, and it ought naturally to lie upon the Party who denies it to prove that Titles of Honour are regulated by a different Law in Point of Descent from every other Inheritance. But, besides the general Reason to support this Proposition, there are strong Authorities in its Favour.

And, 1st, *The Opinion of Lawyers.*

Stair's Instit. B. 3, Tit. 5, § 11.

Lord *Stair*, Instit. B. 3, T. 5, § 11, says, "Heirs Portioners are amongst Heirs of Line; for, when more Women or their Issue succeed, failing Males of that Degree, it is *by the Course of Law* that they succeed;" and, "though they succeed equally, yet Rights indivisible fall to the eldest alone, without anything in lieu thereof to the rest; as the Dignity of Lord, Earl, *&c.*

Instit. B. 3, Tit. 8, Works, vol. ii. p. 326.

Sir *George M'Kenzie*, Institutions, B. 3, T. 8, § 25,

speaks to the same Purpose; and it is obvious that both these Authorities are directly applicable to the present Question, because both Authors are speaking of the Rules of Descent *by Course of Law;* and, unless an Heir Female is capable of inheriting a Peerage erected by Creation in Parliament, there is no Title of Honour which she can inherit by *Course of Law;* for all Peerages by Patent and Charter contain express Limitations of the Honour, by Virtue of which, and not by Course of Law, the Succession thereof descends.

2dly, The Number of Instances of Females succeeding to ancient Peerages without any Question being made.

So it was in the Case of the Earldoms of *Athole*, *Angus*, *Buchan*, *Fyfe*, *Lennox*, *Mar*, *Monteith*, *Ross*, and *Strathern*, created prior to the Reign of *James* I. of *Scotland*. And of later Creations, in the Earldoms of *Athole* and *Buchan*, and the Lordships of *Carlisle*, *Dirleton*, *Harris*, *Oliphant*, *Salton*, and *Semple*, all which are set forth in the Proceedings upon the Peerage of *Lovat* in the Court of Session in 1730.

3dly, The Authority of two adjudged Cases.

The first is that of the Title of *Oliphant*, which was claimed by the Heir Male of Lord *Oliphant*, and also by the Daughter: There was no Patent to show any Erection of the Lands into a Lordship, and the Peerage was proved only by the Evidence of ancient Papers, and by the Enjoyment of it by the Ancestors of the last Lord, as in the present Case; and the Court of Session there held, *that this Use was enough, conform to the Laws of this*

Case of Oliphant, July 11, 1633.

*Realm, to transmit such Titles to the Heir Female, where there was no Writ extant to exclude her.*

Durie, 685. This Case is reported by *Durie*, and the Decree was pronounced in the King's Presence.

Case of Buchan. *James Stewart* was created Earl of *Buchan Anno* 1469. His Grandson, *John* Earl of *Buchan*, had two Sons, *John* and *James*. *John* died in the Life of his Father, leaving a Daughter, *Christian*, who succeeded her Grandfather, and was Countess of *Buchan;* she, by her Husband, *Robert Douglas*, had Issue a Son, who died, leaving only one Daughter, *Mary*, who, by the Name of *Mary*, Countess of *Buchan*, was, on the 20th *May* 1615, served Heir to her Grandmother, *Christian*, Countess of *Buchan*, there being then alive an Heir Male, the Grandson of *John* Earl of *Buchan*, by *James*, his second Son. In 1628, this Countess of *Buchan* brought an Action for declaring her Precedency against six or seven Earls who had been placed before her, and her Claim, founded on the Right of an Heir Female to succeed to a Title without Patent, was allowed by the Court of Session.

Objection. The only Objection, it is apprehended, that can be made against the Doctrine here maintained is, that Titles of Dignity are Masculine Fiefs by the Law of *Scotland*, and have often so descended, and were so held by the Court of Session in the Case of *Lovat*.

Answer. The Female Succession is universally received in *Scotland*, and there never were any Fiefs by their Nature incapable of descending to Females; the Crown was descendible to an Heir Female, and all hereditary Offices have been so, even at the strictest

Periods of the Feudal Law. Wherever the Succession went to the Male Line, it has done so by particular Provision, and not by the Course of legal Descent.

There is a Fallacy in arguing from the Cases of ancient Peerages that have descended to Heirs Male in Exclusion of a nearer Heir Female, because it might often so happen, and most commonly did, in Peerages created by Charter containing Grants of Lands and special Limitations; but no Conclusion can be drawn from thence to the Case of Peerages by Creation in Parliament, without any special Words of Limitation.

The Proceedings before the Court of Session on the Peerage of *Lovat* were without Power or Jurisdiction, and can have no Influence on the present Question. But even were any regard paid to the Authority of that Opinion, it does not apply to the present Case; for what weighed with the Court there was, that the Right to the Lands of the Barony had gone in a perpetual Channel to Heirs Male, and here these Rights have, for upwards of a Century, been limited to Heirs General.

M'Dowall's Institut. B. I. T. 2, § 30, vol. i. p. 52.

AL. FORRESTER.
AL. WEDDERBURN.

## ABSTRACT OF THE SIGNATURE.

CHARLES R.

OUR Sovereign Lord, &c. ordains an Charter to be past and expede under his Majesty's Great Seal, in due Form, GIVING, &c. To *John* Earl of *Cassillis*, &c.

Fo. 3. (*Proviso*) The saids Daughters and Heirs Female respective and successive, who shall happen in any Time coming to succeed to the Lands and Estate underwritten, always marrying a Gentleman of Quality, of the Sirname of *Kennedy* at the least, who, and the Heirs to be procreat betwixt them, to succeed to the Lands and Estate underwritten, by Virtue of this present Taillie and Provision, shall assume, take on, bear, and use in all Time coming, the Sirname of *Kennedy*, Arms and *Dignity* of the Family of *Cassillis*.

3. ALL and HAILL the Earldom and Lordship of *Cassillis*, &c.

9. All which remanent Lands, &c. were all formerly united, annexed, erected, and incorporated in an whole and free Earldom and Lordship, called, and to be called in all Time coming, the Earldom and Lordship of *Cassillis*, with the Title, Dignity, Precedency, and Priority due to the said Earl, and his Predecessors, by the Laws and Practice of this Realm; conform to a Charter, granted by his Majesty's umquhile dearest Father, King *Charles* the Ist, of ever blessed Memory, under his Majesty's Great

Seal of this Kingdom, of the Date the penult Day of *September*, 1642.

11. Whilks haill Lands, &c. pertained heritably of before to the said *John* Earl of *Cassillis*, holden by him immediately of our said Sovereign Lord for his Highness self, as King, and as Prince and Stewart of *Scotland*, his immediate lawful Superiors of the same respective; and Whilks were by him, and his lawful Procurators in his Name, to that Effect specially constitute, *and by his Letters Patent, duly and lawfully resigned, surrendered, upgiven, and overgiven*, in the Hands of the Lords, and other Commissioners of his Majesty's Exchequer, &c. as in the Hands of our said Sovereign Lord, for his Highness self, as Prince and Stewart of *Scotland*, immediate lawful Superiors of the same respective above-mentioned, purely and simply by Staff and Baston, as use is, At the Day of together with all Right, Title, &c.

15. As authentic Instruments taken upon the said Resignation in the Hands of
Notar Publick, at more Length proports. And SICK-LIKE, our said Sovereign Lord, for his Highness self, as King, and as Prince and Stewart of *Scotland*, for the many great, true, and thankful Service done and performed to his Majesty, and his Highness most noble Progenitors, of ever blessed Memory, by the said *John* Earl of *Cassillis*, and his Predecessors in Time bygone, and for many other good Respects and weighty Causes and Considerations, moving his Highness, his Majesty for himself, as King, and as Prince and Stewart of *Scotland*, with Advice and Consent foresaid, HAS OF NEW GIVEN, &c.

17. The saids Daughters, and Heirs Female *respective and successive*, who shall happen in any time coming to succeed to the Lands and Estate abovewritten, always marrying an Gentleman of Quality, of the Sirname of *Kennedy* at the least, who, and the Heirs to be procreat betwixt them, to succeed to the Lands and Estate abovewritten, by Virtue of this present Tailzie and Provision, shall assume, take on, bear, and use, in all Time coming, the Sirname of *Kennedy*, Arms and Dignity of the Family of *Cassillis*.

ALL and HAILL the Earldom and Lordship of *Cassillis*, &c.

Fo. 24. Likeas the haill foresaids Lands, Baronies, &c. are all formerly unit, annext, erect, and incorporat in an haill and free Earldom and Lordship, called, and to be called in all Time coming, the said Earldom and Lordship of *Cassillis*, with the Dignity, and Precedency, and Priority, due to the said Earl and his Predecessors, by the Laws and Practice of this Realm, conform to the Charter abovementioned, granted under his Majesty's Great Seal of this Realm thereanent.

28. And in like Manner, our said Sovereign Lord for himself, and as Prince and Stewart of *Scotland*, with Advice and Consent foresaid, has of new, unite, erect, and incorporate, and by these Presents unites, erects, and incorporates, ALL and SUNDRY the foresaids Lands, Baronies, &c. in an haill and free Earldom and Lordship, called, and to be called in all Time coming, the Earldom and Lordship of *Cassillis*, to be bruiked, enjoyed, and possessed, by the said *John* Earl of *Cassillis*, and by his Heirs Male, and of Pro-

vision and Taillie respective foresaid, conform to the Precedency and Priority of Place, due and competent to them by their Rights, and Laws and Practice of the said Kingdom of *Scotland*, in all Time coming, without any Revocation or Contradiction whatsoever.

41. Likeas our said Sovereign Lord promises *in verbo principis* to ratify and approve this present Charter, with Infeftment to follow thereupon, and all that shall happen to follow upon the same, in the haill Heads, Articles, Clauses, Provisions, Conditions, and Obligements thereof abovementioned, and that in the next Parliament to be holden by his Majesty and Estates thereof within his Highness said ancient Kingdom of *Scotland*.

## ABSTRACT OF THE CHARTER 1671.

Carolus, &c Sciatis, nos, pro nobis, &c dedisse, concessisse, disposuisse, et hac presenti Carta nostra, confirmasse, tenoreque ejusdem cum avisamento et consensu prædicto pro nobis metipsis, tanquam Rege, et tanquam Principe et Senescallo *Scotiæ*, dare, concedere, disponere, ac pro nobis et Successoribus nostris pro perpetuo, confirmare, confiso et prædilecto nôstro Consanguineo et Consiliario, *Joanni* Comiti de *Cassillis*, Domino *Kennedie*, et Heredibus Masculis inter eum et Dominam *Susannam Hamiltone* ejus Sponsam legittime procreat. vel procreand. Quibus deficien. dicto *Joanni* Comiti de *Cassillis*, suis Heredibus Masculis de corpore

suo legittime procreand. de quovis alio Matrimonio cum quacunque alia legittima Sponsa, Quibus etiam deficien. Heredi Femellæ natu maximæ legittime procreat. vel procreand. inter dictum *Joannem* Comitem de *Cassillis*, et dictam Dominam *Susannam Hamilton* ejus Sponsam, successive sine divisione, Quibus deficien. Heredi Femellæ natu maximæ de Corpore dicti *Joannis* Comitis de *Cassilis* ex quocunque alio Matrimonio procreand. sine divisione ut dictum est; Heredes Femellæ respective prædict. omni modo viro nobili, vel generoso qualificato, Cognomine de *Kennedie*, nuben., saltem, uno qui et Heredes, inter illos legittime procreand. ad Terras et Statum subscript. virtute hujus presentis Talliæ et Provisionis succeden. assument, suscipient, ferent, gerent, et utentur omni tempore futuro Cognomine de *Kennedie*, Armis et *Dignitate* Familiæ de *Cassillis*, et implementes et observantes alias conditiones et provisiones subscript, tantumodo et non aliter, &c.

Totum et Integrum Comitatum et Dominium de *Cassillis*, &c. Quæquidem omnes reliquæ terræ, &c. sunt annexat. creat. et incorporat. in unum Integrum et Liberum Comitatum et Dominium, nuncupat. et nuncupand. omni tempore futuro, Comitatum et Dominium de *Cassillis, cum Titulo, Dignitate, Precedentia et Prioritate dicto Comiti et Predecessoribus suis*, per Leges et Praxin. hujus Regni nostri debit. secundum Cartam per quondam nostrum charissimum Patrem *Carolum* Primum, Regem beatissimæ memoriæ, sub suo magno sigillo hujus Regni nostri, concess. de data, penultimo die mensis *Septembris*, 1642.

Et similiter, &c nos pro nobis, &c pro plurimis magnis fidelibus et gratuitis servitiis, nobis et nostris Progenitoribus beatæ memoriæ, per dictum *Joannem* Comitem de *Cassillis* suosque predecessores impensis et prestitis, ac pro multis aliis bonis respectibus, magnis et onerosis causis et considerationibus, nos moven. &c de novo Damus, concedimus, disponimus, ac pro nobis et successoribus nostris Regibus et Principibus *Scotiæ*, pro perpetuo confirmamus, dicto nostro confiso et prædilecto Consanguineo et Consiliario *Joanni* Comiti de *Cassillis* et Heredibus Masculis, inter eum et dictam Dominam *Susannam Hamiltone*, ejus Sponsam, legitime procreat. vel procreand. Quibus deficien. Heredibus Masculis de suo Corpore ex quovis alio Matrimonio legitime procreand. Quibus etiam deficien. Heredi Femellæ natu maximæ, inter eum et dictam suam Sponsam legitime procreat. vel procreand. sine divisione, Quibus deficien. Heredi Femellæ natu maximæ, de Corpore dict. Comitis procreand. ex quovis alio legitimo Matrimonio, sine divisione, ut dictum est; dict. Heredes Femellæ respective omni modo Nobilem seu generosum virum qualificatum, Cognominis de *Kennedie*, nuben. saltem, unum qui et dict. Heredes Masculi legittimi inter illos procreand. ad Terras et Statum supra et superscript. virtute hujus presentis Talliæ et Provisionis successuri, assument, suscipient, gerent, ferent, et utibuntur omni tempore à futuro, Cognomene de *Kennedie*, Armis *et Dignitate* Familiæ de *Cassillis*, et Implementes et Observantes, alias conditiones et provisiones superscript. tantum modo, et non aliter, &c. Totum et Integrum predictum Comitatum et Dominium de

*Cassillis*, &c. Quæ quidem omnes sunt per prius unit. annexat. erect. et incorporat. in dictum integrum et liberum Comitatum et Dominium, nuncupat. et nuncupand. omni tempore futuro, dictum Comitatum et Dominium de *Cassillis, cum Titulo, Dignitate, Precedentia et Prioritate dicto Comiti*, suisque Predecessoribus debet. per Leges et Praxin hujus Regni nostri, secundum tenorem Cartæ supra mentionat. sub nostro Magno Sigillo hujus Regni nostri quatenus concess. &c.

Ac similiter, nos, pro nobis et tanquam Princeps et Senescallus *Scotiæ*, cum avisamento et concensu prædicto, de novo univimus, ereximus, et incorporavimus, tenoreque presentis Cartæ nostræ, de novo univimus, annexamus, et incorporamus, omnes et singulas prædictas Terras, Baronias, &c in unum integrum et liberum Comitatum et Dominium, nuncupat. et nuncupand. nunc et omni tempore futuro, Comitatum et Dominium de *Cassillis*, fruend. gaudend. et possidend. per præfatum *Joannem* Comitem de *Cassillis*, ac per Heredes suos masculos, provisionis et talli, respective ante dict. *secundum precedentiam et prioritatem loci*, ipsis debit. et competen. per eorum Jura, et per Leges et Praxin. dicti hujus Regni nostri *Scotiæ*, omni tempore futuro, sine ullo revocatione aut contradictione aliqualis. Tenendum et Habendum, &c.

Nec non nos promittimus in Verbo Principis hanc presentem cartam nostram, cum Infeofamento de super sequen. et omne quod desuper sequi contigerit, ratificare et approbare in integris capitibus, articulis, clausulis, provisionibus, conditionibus, et obligationibus earundem supra mentionat. idque in

proximo Parliamento per nos et status ejusdem infra hoc antiquum Regnum nostrum *Scotiæ* prædict. tenen.

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Consideration of the two claims was from various causes deferred; latterly, upon the application of the Earl of March, who petitioned the House of Peers for delay until access should be procured to certain ancient writings preserved amongst the family muniments, and which had, under authority of the Court of Session, been sealed up.* Upon the 22d day of January 1762, after a full discussion, the following opinions were delivered:—

The Earl of Marchmont addressed the Committee in substance as follows. He observed that the cause had been argued at great length. That it was the single cause of Peerage that had come before the House for half a century past, for the few causes which had been determined since the Union, singly related to matter of succession upon patents of honour; but this comprehended the constitution of Peerages, and the general rule of descent. That therefore there behoved to be great variety of opinion, as some would found their judgment upon the principles of the law of England, and others would be influenced by a mixt notion of the laws of both countries. That this case, however, must certainly be determined upon the general principles of the law of the country where the case itself took its rise. The case in general is, Whether the heir-

* See Appendix.

male descended of the body of the first Earl of Cassillis, or the heir-general of line, is entitled to the Peerage?

The counsel laid the case very properly on two foundations; first on the charter 1671, and then on the notion of a feudal dignity. With respect to the first, he took occasion to enlarge on the nature and importance of charters. That they were evidence, *omni exceptione majores*. That nothing could affect their validity. That they were drawn and revised with great accuracy. That their constitution was the same in all ages. That some in Scotland were as old as the time of Malcolm the Fourth, in the eleven hundred and odd, some in 1094. That they all began with the King's name, after which followed the dispositive clause, then the tenendas, and lastly the reddendo. That it was a fixed rule of law, that nothing could be carried by the charter but what is contained in the dispositive clause. That Craig was not clear whether the tenendas carried any thing. That after the dispositive clause followed the quæquidem, which contained the *causa* and *modus vacandi*, by what means the estate came into the King's hands. That the interpretation of charters was of the utmost consequence, and merited the greatest attention, as they affected all property. That the cases of Rothes and Kilmarnock, &c. mentioned at the bar, were different from this, as they mentioned the *titulum dignitatis* separate from the lands. That there was no erection in these charters, therefore the title was separate; but when the lands are erected into a Lordship or Earldom, as in the present case, then the title is not separated,

the expression therefore is different; and it is very observable in this case, that the expression in the charter 1671 is *dominium et comitatum et terras*, &c. The reason is, the lands were erected *cum titulo;* there was a novodamus in this charter, and this new grant operated as an original charter. It was said that nothing new could be carried by this grant; but certainly new subjects may be carried by a novodamus. A man may have a fishing and other subjects; and there are many cases directly in point which prove this. He then read a paragraph from Dirleton, p. 135. He said that in this charter there was a *comitatum*, which always contained a dignity; that this was explained by the words *secundum prioritatem*, &c. That the counsel in arguing in this case had been guilty of great mistakes, particularly in saying that a Peer could be created in Parliament by cincture. That the cincture was merely a symbol. That the next mistake was in saying that these dignities were feudal. That it appeared there were no Lords of Parliament till the feudal law was out of date. That the first were in the time of James the First, who introduced the forms of the law of England. It was a general rule there could be no Peer without writ; the creation in Parliament was all a mistake; the cincture was merely a symbol. Symbols were very ancient, and prevailed in all ages; they are mentioned in the Bible, in the case of swearing. Craig mentions all the usual symbols, but makes no mention of the symbol of a dignity. The notion of a creation in Parliament has arisen from a very superficial writer, Sir George M'Kenzie. He read the paragraph from Sir George M'Kenzie,

p. 335, concerning Peerage and the solemnity of investiture, and said that it appeared that the patent was always carried, which shows the patent then existed. That it appeared after the solemnity of investiture wore out, the modern patents contained a particular clause, dispensing with the ceremony of investiture; and he mentioned the patents of the Earldom of Wigton, Dunfermline, and Lothian. He said there could be no investiture without writ. That the Lords of Erection were all made by charter. That there could be no feudal succession where there were no words in the investiture limiting the descent. He introduced Craig as author of the feudal law in Scotland; made great encomiums on him for the elegance of his style, and his having been educated with Cujacius, the greatest civilian that ever existed, but that his notions were all derived from the feudal law of Lombardy. That his notions were wrong, for we had certainly the feudal law earlier, the books of the feud being wrote in the eleventh century. That we had charters as early as the year 1094. That Craig makes a doubt with regard to female succession; but certainly our succession was always lineal and always female, and where there was an heir-male, he was no heir of law, but an heir of provision. That the case of Lovat had no weight with him; the Judges differed in opinion, and Lord Newhall, the greatest of the Judges, supported the female succession. That the question was amicably determined by a decreet-arbitral of Lord Dun and Lord Grange, the first their Lordships had seen in this house, and the other was well known. That the late Lord Lovat, who suffered justly for his crimes, paid a com-

position of L.12,000, and the heir-female was prohibited from taking the title, under a penalty of L.30,000. That he had given his clear and impartial opinion upon the general points in this case, still open to conviction, and under correction when he was mistaken. That he chose to deliver his opinion first, (without claiming any precedency from his knowledge in the law of Scotland,) because he did not doubt there would be a variety of opinions; but for his own part he could not give up his opinion, in compliance to any authority, or to any character, however respected.

Lord Mansfield spoke next, in substance as follows :—

My Lords, I rise up to deliver my opinion upon this question, which is of great extent. The *ratio decidendi* must be sought for through a load of rubbish, and matters are so involved in obscurity, that I may use the expression of a celebrated author, that the little light which we have, like the flash of lightning in a storm, only serves to make the darkness more visible.

The facts which gave rise to this question are shortly these. Upon the 10th of August 1510, it appears that David Lord Kennedy was then Earl of Cassillis, and in 1509 it appears by the Rolls of Exchequer that he was only Lord Kennedy. The Rolls of Parliament from 1505 to 1524 are lost ; but it appears in 1524 the Earl of Cassillis sat in that Parliament.

Sir Thomas Kennedy claims this dignity, and derives his pedigree as heir-male descended of the

body of David the first Earl of Cassillis, which he certainly is. The Earl of March claims the same dignity, as heir-general of line by female descent. There are two questions. The first is, Whether a title of honour, by its own original nature and constitution, descends to an heir-male, or to the heir-general? And the second question is, Supposing it descends to an heir-male, whether in this case there is any grant, with limitations such as will carry it to the heir of line?

The first question is, how we shall discover a rule of descent where there is no evidence of an actual creation, no letters patent, no investiture or introduction into Parliament, and no charter of erection? But in this case we are certain that the Earl of Cassillis must have been made an Earl *titulo hereditario*, because he sat in Parliament as an Earl, and the heirs-male, who were always heirs-general, enjoyed the dignity successively until the last Earl, who died in 1759. In this case, I am of opinion that the descent must be determined by a legal presumption; but there being no evidence of facts sufficient to determine clearly what that presumption should be, there is a great difficulty in the question. I have in this case taken great pains, and I think I have found some probable reasons which have satisfied me, and on which I have founded my opinion. I will only trouble your Lordships with the general grounds of my opinion, without attempting to support it by authorities, or to give the reasons at large, which would run to a great extent, and be the work of days.

It appears that the feudal system was very early

introduced into Scotland. It brought with it Earldoms and other territorial dignities, which in their proper original and first nature were territorial offices, accompanied with a power and jurisdiction. They were held *in capite* by a military tenure, and were unalienable without consent of the King or Lord Paramount. They most certainly descended to the issue male, and the representation was in the right line, that is, the heir always took under the first grantee, and as descended of his body, not as connected with the last successor. How long these territorial dignities continued we are totally in the dark; how, or when, the lands of territorial Earldoms became alienable, and got into commerce, no where appears, but they were certainly masculine fiefs. When they came to be *in commercio*, the alteration from territorial to personal dignities followed by degrees. Territorial dignities could not remain after the fee was dismembered. The dignity could not fall to any particular parcel or part of the lands more than to another, unless the dignity had been annexed to the capital seat or some other part of the fief; but nothing of this kind can be shown. Lord Kames, in his Essays, conjectures, but it is merely a conjecture unsupported by evidence, that when feus began to be split and divided, personal dignities were first introduced. There is great ground to believe the territorial dignities ceased long before the 1424, when King James the First returned from England. The territorial form continued, though the substance was gone. There are many charters granting in appearance territorial Earldoms and Lordships; and yet before 1424 all

lands were *in commercio*, and the territorial honours must have been gone when the lands were sold. This is most evident, for we find in 1467 a judicial sale was introduced for debt as to all lands, whether noble or not. Personal dignities gave rise to new ceremonies by investiture.

The Lords of Session's report to your Lordships concerning the Peerages of Scotland was formed with great thought and care. It says, " Titles of honour were created before the reign of King James the Sixth, by erecting lands into Earldoms and Lordships, and probably by some other method that cannot now, in matters so ancient, be with any certainty discovered."

But I incline to be of opinion with the noble Lord who spoke last, that there was no creation of any Earl or Lord of Parliament, without some charter or writing; but though these creations sprung from territorial dignities, yet there is no proof that they are the same in any respect. The form and words accompanying territorial dignities continued, though the substance was gone. The creation of Patrick Lord Hailes as Earl of Bothwell, in 1487, is a creation by writ, with a limitation of heirs. The words are, " *eundemque Dominum Patricium in Comitem creavit, et Comitis titulo decoravit, per præcinctionem gladij ut mos est, ita quod ipse et sui hæredes pro perpetuo futuris temporibus Comites de Bothwell vocentur, Comitisque dignitate fulgeant.*" From this there may be several observations drawn, and particularly that at this time, in 1487, girding with the sword alone did not make him an Earl; there behoved to be words of limitation, *ita quod hæredes*

*sui*, &c. Sir George M'Kenzie says, " that none were nobilitated by patent before the time of King James the Sixth." The Lords of Session, in their report concerning the Peerages of Scotland, don't lay it down as certain that there were no Peerages by patent before this time; they only say, " They can't discover any in the records earlier than the reign of King James the Sixth;" but certainly there were several Peerages by patent, though not upon record. In the present case there is no patent, yet that is no proof that the Peerage was not granted by writ. The Peerage of Glencairn was granted by patent in the reign of James Third, in 1488, yet it does not appear on record. I observe in a note, mentioning the creation of Lord Darnley in 1565, it is added, " that if need bees, letters patent should be expede." This shows that patents then were thought necessary. In the year 1592, when church lands and tithes were erected into temporal Lordships, King James Sixth, by an express act, " excepts and reserves all erections, charters, and infeftments granted to such persons as had then received the honours of Lords of Parliament, by the solemn form of belting, and other ceremonies used in such cases." Thus it plainly appears, that the ceremony of belting existed even after charters of erection were introduced. Sir George M'Kenzie says, there was a form of nobilitating besides letters patent and the ceremony by investiture. He mentions the creation of the Earl of Huntly in 1599. He there states that the patent was carried in the procession; and though it was not read, it was delivered as a part of the title, and therefore was not for the first time in-

troduced. It was not proved at the bar, that any Earl was created without words of limitation. Lords of Parliament have been compared to Barons by writ, and were said to have been brought from England by King James First. But every authority contradicts this. Before the 1458, the King's vassals all sat in Parliament. The Lords of Parliament who did not sit there as vassals of the Crown must have been some way created or made. The creation of the Lord of the Isles in 1476 was by writ, though the record only mentions "quo die factus fuit Dominus Parliamenti."

It appears that most frequently there was a charter of erection of the lands at the time the title of honour was conferred. If the lands were limited to heirs-male, the title of honour cannot be supposed to descend in a different channel from the lands in the charter. Therefore, every creation of a Peerage must have been of words some way or other, and there is no authority to the contrary. And as to there being no letters patent before James Sixth, it is plainly a mistake. The first question must therefore be, what is the presumption as to the descent of these titles of honour where there are no words to direct us? This can only be determined by presumption. Many things concur to prove, that lands descended to the heirs-male of the body of the person to whom the fee was originally granted. The presumption of law follows properly the nature of the fee. Every fee was presumed to be held by a military tenure, unless a soccage or some other tenure was shown. It was therefore presumed that the lands descended to heirs-male. This presumption is

strongly supported by the instance mentioned at the bar, that *hæredes*, without any addition, meant heirs-male; and as this took place in lands, so the same rule followed in noble feus. This is proved by the case of the Earldom of Strathern, which was granted *hæredibus suis*, and Buchanan mentions that it was considered as a masculine fief, and returned to the King on failure of heirs male. There is a more modern instance in the title of Lennox. Other authorities confirm this; and the presumption is supported by the authority of Craig, who says, if a feu is limited to heirs-male and female, the females cannot take till the male line is extinct. But further, besides the fees being feudal, another circumstance confirms the presumption in favours of the heir-male —Lord March has only been able to bring one instance of an Earldom descending to a female. It was the case of Buchan. But the force of this instance was taken off, by the resignation, and the new grant of the honours in favour of the heir-female, with the express consent of the heir-male. On the other hand, the eleven instances brought by the heir-male afford convincing evidence of the exclusion of females. There was only one answer made to these, and that was, that the titles of honour might possibly have been so limited by charters of erection, though these did not appear. But this can have no weight. Where there is no light to direct us, the way most frequent must be presumed. In England, patents of honour in the fifteenth century were uniformly in favour of the heirs-male. Patents of honour in Scotland, in the time of Queen Mary and afterwards, were limited to heirs-male. The reason

of the presumption subsists now as strongly as in former times; and it cannot be doubted, that if the question had occurred in these times, the presumption would have stood in favour of heirs-male. This is farther confirmed by the case of the Earl of Sutherland and the Earl of Crawford, concerning precedency. There is no bad report of the case in Forbes' Collection of Decisions. He says, the Commissioners who determined the precedency in 1706 proceeded on this general ground, that "an estate did not pass to females, unless provided *hæredibus quibuscunque*, males being only understood by heirs simply, or *hæredes inter ipsos;* and where the provision was to heirs whatsoever, the heir-male was still preferred, and the female succeeded only *æquis portionibus*. It was yet much later that an heir-female was allowed to succeed to a dignity with jurisdiction, upon the account of personal unfitness, and the absurdity of possessing the indivisible title with a part of the divided estate. The dignity in this case was not feminine by King David's charter to William Earl of Sutherland and the Lady Margaret his spouse, for that neither conveyed the estate nor the dignity, but only added a regality to it." The Court of Session proceeded on the same grounds, that where no limitation appeared, they presumed in favour of the heir-male of the body of the person first ennobled. The case was determined in the Court of Session in 1706, when there was an opposition on the same grounds, and the Court of Session had then most certainly a competent jurisdiction.

It is a farther presumption in favour of heirs-

male, that so many resignations appear on record, all calculated to let in the heirs-female, who could not otherwise have taken the dignities. Four of these were read at the bar, viz. Rothes, Errol, Kilmarnock, and Kinghorn. There is no authority to presume otherwise than in favour of the heirs-male, except in the case of Oliphant, determined in 1633. But I pay no regard to that case. It does not appear that there was any evidence whatever of the original constitution of the dignity; nor does the reason appear why the heir-female was preferred to the succession. Besides, there are two points determined in that case, which are manifestly wrong, and against common sense. 1st, A man resigns upon condition that a new grant may be made in favour of particular heirs; the Lords say he has lost his fee, and the King may keep it; and, 2dly, They say a Peerage might be surrendered without the King's leave. I therefore pay no regard to that decision. It has been said the King was present, but I rather think it was the Lord Advocate on behalf of the King. I hold the case of Lovat as a good authority, though there was a difference of opinion among the Judges. The case was long argued, and maturely considered. At least, I hold it to be as good authority as that of Oliphant. The gentleman who argued the case of Lovat, Mr Duncan Forbes, afterwards President of the Session, was strongly with the determination; and the judgment so far acquired an authority, that the Parliament proceeded upon it in the trial of Lord Lovat. But let the case have what authority it may, it appears the report of the Lords of Session gives sanc-

tion to it in some measure. It says, that there is not any maxim established in the law of Scotland, that can be applied universally to determine the descent of Peerages, when the original constitution, or new grant upon resignation, do not appear; yet, on mentioning the case of Lovat, it is added, that they found the title descendible to heirs-male. One of the books of Reports says, that the Court of Session determined this case on the evidence that the estate was limited to heirs-male. This shows that the descent of the title of honour was founded only on presumption. And as in the present case there is no proof of a limitation of the title of the Earl of Cassillis, I am of opinion it ought to descend to the heir-male of David first Earl of Cassillis. If so, it is necessary to consider the 2d question, Whether in this case there was a new grant, upon a resignation, to a series of heirs, so as to let in the heir-general? And in this I shall give such reasons as fully satisfy me that I cannot agree with the noble Lord who spoke before me. I have seen and considered the charters, and I take the charter of 1642 to explain and illustrate the charter 1671.

In 1642 the title of honour was personal, without any connection with lands. There was no charter of erection till this time; and though the lands are in the instruments preceding this charter called the Earldom, yet they were only so called in vulgar speaking. They were not erected into an Earldom at that time. The instrument of resignation runs thus:—"For establishing the fee of the estate in favour of my heirs after-mentioned." Here there is no word in the resignation which has any tendency

to an Earldom. The intention is to establish the fee of the estate, but no word of the title of honour. Then follows,—"in favours, and for new infeftments," of what? not the title of honour, but of the lands of the Earldom. It is agreed that this charter was not signed by the King, and of consequence the erection could not be good. There are many words in this charter which have a strange appearance; but these can have no weight. Charters pass *periculo petentis;* many lands are inserted in charters to which the grantee has no title. I take it that nothing can pass by such right. It is clear the King could grant nothing but what was resigned. Here the honours were not resigned, and therefore could not pass. The dispositive clause does not contain any word relative to honours; and nothing could be granted but what is contained in the dispositive clause. The novodamus can give nothing but what was resigned, unless casualties of superiority, feus, jurisdictions or privileges, immediately flowing from the King. This charter contains a clause erecting the lands into an Earldom; after this follows a sweeping clause, to be enjoyed "secundum præcedentiam et prioritatem loci, illis, per eorum jura legesque et praxin regni nostri Scotiæ, debitum et competentem." The import of this is, that what was then erected could be enjoyed only according to law. The personal title never was granted, and the old title never could follow this new erection. No person can conjecture whether it related to an old or new title. I won't pretend to guess what the words do mean, whether to give any rank or not; but it is plain the title was not granted.

Thus the charter 1642 can have no effect; there was no connection between the lands and the title. The Earl of Cassillis might have sold the one and kept the other. The new resignation in 1671 is only relied on. This resignation don't appear; but it makes no difference. The contents of it are sufficiently clear, and appear two ways; 1st, by the docquet subjoined to the signature, which makes no mention of the dignity; and, 2dly, by the dispositive clause, which grants the Earldom and Lordship exactly as in 1642. No word of the title of honour. No general words which can carry it. After the description of the lands, there follows two *Quæquidems*. The first mentions that the lands were erected by the charter 1642; but here it is shown there was no distinct grant or resignation of honour or dignity. Then follows another *Quæquidem*, which mentions what was resigned, and this distinctly mentions that the lands only were resigned. Then follows a novodamus, which erects the lands into an Earldom, as in the charter 1642—*secundum præcedentiam et prioritatem loci*, &c. The words are the same in both. In the charter 1671, the clerk copied them exactly from the charter 1642. It is not easy to know what meaning these words have, nor of another clause relating to the husband of the heirs-female assuming the dignity on marrying such heir-female. If those words could carry a title of honour, it would create strange consequences. At any rate, the title of Lord Kennedy is not in this charter. If, therefore, this charter was to operate as a new grant, the title of Lord Kennedy must go one way,

and that of Earl of Cassillis be separated, and go in a different channel. But it is not possible to believe that this could ever be intended.

I speak with great diffidence; but I can see no argument that can be urged from the law of Scotland to oppose the construction of the charter in the way I have laid down. The charter 1671 passed when every notion of territorial dignities had ceased for above a century. The whole estate might have been sold or adjudged, and yet the title of honour have remained with the family. The very form of resignation, and of the new grant of a dignity, was established before this time, and there were four instances read at the bar, which clearly and properly conveyed the title and dignity, as separate and distinct from the lands. I remember several other instances that occurred in the question with respect to the Peerage of Stair, where the dignity alone was resigned for the purpose of a new grant. Many of them were about the same time with the present charter in 1671. For these reasons, I am inclined to be of opinion that the charter 1671 does not grant the title or dignity. I ask pardon for speaking at so great length, but the question is of great consequence.

Lord Marchmont answered—

My Lords, I do not rise up to dispute. There are two things very material in the proceedings, which I wish to mention to your Lordships. The first is the interpretation of the charter 1671 from the charter 1642. I never saw the charter 1642, so that I could not found any reasoning upon it; all I said re-

spected only the charter 1671.—The next material circumstance is with relation to the proceedings in passing of charters. I repeat what I formerly said, that charters do not pass *periculo petentium*. By the practice of the Exchequer, they are regularly examined and revised. If the Barons should neglect their duty in this particular, they are liable to forfeit their office. It is true, lands may be repeated in a charter, though they no longer belong to the grantee; but this happens seldom, for as the composition paid for the charter is stated in proportion to the value of the lands, it is not to be imagined that any person would pay composition for lands when they do not belong to him. I beg pardon for troubling your Lordships, but it was necessary to mention this.

Lord Mansfield replied—

The charter in 1642 was fully stated at the bar. It was indeed waved, except in so far as it served to explain the charter in 1671, which recites it. I saw and read the original charter, and the instrument of resignation upon which it proceeded, having been attended by the agents on both sides.—I stated the very words of the charter itself.

Lord Hardwicke spoke next, in substance as follows—

My Lords, I shall trouble your Lordships with a few words on this occasion, which I would not have done, but that I find there is a difference of opinion.

There is a great deal of obscurity in the case, but no doubt one or other of the two claimants are

entitled to the peerage in question. The difficulty is, which by law is entitled to it? There were two questions made, and both were very ably treated at the bar. I was determined to have heard the pleadings at large, but unfortunately I was not able to attend on the last day, having been disabled by sickness. I heard, however, what passed, and I find that nothing very material occurred.

The first question is, what was the original nature and constitution of peerage, and to what heirs they ought to descend, where no patent appears? The second question is, whether in this case any alteration has been made in the legal descents by a new grant? This last depends upon the construction of the resignation and charter in 1671; for the charter 1642 cannot be used but to assist in explaining the charter in 1671.

The first question is very large, and of great importance. If ancient peerages, where no patents appear, are found to descend to the heir-general of line, it may have very extensive consequences. It is agreed that there was no creation of superior peerages, such as Dukes or Earls, without some writ limiting the descent. If no limitation appears then for supplying thereof, some method must be followed for discovering the heirs entitled to succeed. If the instrument of limitation is lost, the Court will raise a presumption on the most probable grounds. The loss of the instrument won't prevent the Court from proceeding on those grounds.—In Scotland, it appears by some cases that were mentioned, that the cincture in parliament was the ceremony used; but it does not appear that it was the actual creation

or constitution of the peerage. Here, in England, every constitution of a peerage is supposed to be attended with a particular ceremony, though in fact that ceremony is now laid aside. In Scotland, it appears the ceremony has been particularly dispensed with, by a clause for that purpose in the patent; but in England it is not so. In all creations of peerage in England, the patent bears, "Tenend. de nobis et successoribus nostris sicuti nos tenemus coronam," &c., and the ceremony of the sword is always mentioned. If the instrument of limitation is lost, some presumption must be found to regulate the descent; and I think that presumption ought to arise from the nature of the fee. Peerages in early times were attended with offices, and were certainly masculine fiefs. This founds a presumption in favour of the descent of the heir-male.—Another presumption, when the instrument is lost, arises from the method most frequent. It appears that peerages most frequently descended to heirs-male, and that the resignations were only introduced to let in heirs-female. What possible occasion could there have been for a resignation, if the peerage would have gone so otherwise? There has been only one instance proved of the descent of a peerage to an heir-female where no patent appeared.—Therefore, where the instrument is lost, I think there is the strongest presumption in favour of the heir-male, and I think this is by much the safest method of proceeding in cases of ancient peerages.

The second question is more doubtful. I think it would be very dangerous to hold that the dignity passed by the charter 1671. In England, the ho-

nours only are contained in the patent or grant. In Scotland, the lands are erected into a Lordship or Earldom, and the dignity is at the same time granted. It is agreed, that by the charter 1642 no honours passed, because it was a personal honour, and was not resigned—the words *secundum præcedentiam et prioritatem loci*, and so forth, could not possibly carry the dignity. One cannot say what these words mean. The noble Lord who spoke first said that they meant the precedency of the old peerage; but it is of no importance. As the honours were not granted, no precedency of peerage could be granted. There are two old charters which constitute the family—the head of the Tribe or Kenkynnull.—I think this shows some note of distinction or precedency, though I have not been able to discover the meaning of the word Kenkynnull—possibly this may be the precedency and priority of place alluded to in the charter 1642. But this is only an imaginary construction of words. The Quæquidem of the charter 1671 says, "Quæquidem omnes terræ erectæ fuerunt in unum integrum comitatum, secundum cartam concess." in 1642. It is manifest this gives only such right as the charter 1642 gave. Then follows another Quæquidem, which mentions that the lands only were resigned. As the peerage was not resigned, it could not be granted. The crown could not grant it by the novodamus. And as there is no appearance of words to convey the dignity, it is impossible to say that it passed by this charter. I therefore incline to be of opinion that this charter cannot operate as an

alteration of the legal succession, which I think is to be presumed to be in favour of the heir-male.

Resolved, It is the opinion of this committee that Sir Thomas Kennedy has a right and title to the dignity of Earl of Cassillis, as heir-male descended of the body of David first Earl of Cassillis; and also has a right and title to the dignity of Lord Kennedy, as heir-male descended of the body of Gilbert the first Lord Kennedy.

Upon the 27th January 1762, the "Lord Willoughby of Parham reported from the Lords Committees of Privileges, to whom it was referred, to consider of the petition of William Earl of March and Ruglen, claiming the titles and honours of Earl of Cassillis and Lord Kennedy, and also the petition of Sir Thomas Kennedy of Colzean, Baronet, claiming the same titles and honours, with his Majesty's reference thereof to this House: That the Committee had met and considered the matter to them referred, and have heard counsel for the petitioners upon their respective claims; and after debate and full consideration, heard what was offered and produced in evidence by the counsel on either side, their Lordships are of opinion that the petitioner, Sir Thomas Kennedy, hath a right and title to the honour and dignity of Earl of Cassillis, and that he hath also a right and title to the honour and dignity of Lord Kennedy, as heir-male of the body of Gilbert the first Lord Kennedy.

"Which report being read twice by the Clerk, was agreed to by the House.

" Resolved and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the petitioner, Sir Thomas Kennedy, hath a right and title to the honour and dignity of Earl of Cassillis, as heir-male of the body of David the first Earl of Cassillis, and that he hath also a right and title to the honour and dignity of Lord Kennedy, as heir-male of the body of Gilbert the first Lord Kennedy.

" Ordered, That the said resolution and judgment be laid before his Majesty by the Lords with white staves."*

* The notes of the speeches delivered by Lords Marchmont, Mansfield, and Hardwicke, are taken from the original MS., belonging to the Marquis of Ailsa, collated with a MS. belonging to the Editor.

# APPENDIX.

## I.

## PROCEEDINGS IN THE HOUSE OF PEERS ON THE CLAIMS TO THE CASSILLIS PEERAGE.*

31*st March* 1760.—The Earl of Holdernesse (by his Majesty's command) presented to the House a petition of William Earl of Cassillis, Ruglen, and March, relating to the titles and honours claimed by the petitioner, with his Majesty's reference thereof to this House.

And the same was read by the Clerk, and is as follows:—

"TO THE KING'S MOST EXCELLENT MAJESTY,

'The humble Petition of William Earl of Cassillis, Ruglen, and March,

'*Sheweth*,

'That from the Records of the Parliament of Scotland, and 'other authentic documents, it appears that Gilbert Kennedy of 'Donure was by King James the Second of Scotland, about 'three hundred years ago, created Lord Kennedy, and that in 'the year 1500 David Lord Kennedy, his descendant, was created 'Earl of Cassillis; but of those creations there is no patent now 'extant or upon record.

'That David, the first Earl, was succeeded by his son Gilbert; 'he, by his son, likewise Gilbert; the second Gilbert by his son,

* From the Journals of the House of Lords, Vols. 29 and 30.

'also Gilbert; who was succeeded by his son John; and he by 'his nephew, John, the sixth Earl of Cassillis.

'That the last mentioned John Earl of Cassillis having re-'signed his Earldom and Estate into the hands of the Crown, 'King Charles the First, by charter under the Great Seal, dated 'the 29th of September 1642, re-granted the same unto the said 'Earl for life; and to John Lord Kennedy his eldest son, and the 'heirs male and female of their bodies respectively, as mentioned 'in the charter; whom failing, to the Earl's heirs male whatso-'ever.

'That the said John Lord Kennedy, become Earl of Cassillis 'by his father's death, likewise resigned the honours and estate of 'Cassillis into the hands of the Crown; and King Charles the 'Second, by charter under the Great Seal, dated the 24th of 'April 1671, re-granted the same to the said John, the seventh 'Earl of Cassillis, and the heirs male and female of his own, 'and his father John, the sixth Earl's bodies, in manner therein 'mentioned; whom all failing, to the said John, the seventh 'Earl's nearest heir-male.

'That the said John, the seventh Earl of Cassillis, had a son, 'John Lord Kennedy, who died in his father's lifetime, leaving 'issue only one son, John, who was the eighth and last Earl of 'Cassillis.

'That, by the death of the said John, last Earl of Cassillis, 'without issue, the titles and honours of Earl of Cassillis and 'Lord Kennedy are descended to your petitioner, the great-'grandson of John, the seventh Earl of Cassillis, grantee of the 'charters 1642 and 1671, by his eldest daughter Anne, Countess 'of Ruglen, all the male issue of his body being extinct.

'That nevertheless, Sir Thomas Kennedy of Colzean, Baronet, 'has assumed the said titles and honours of Earl of Cassillis 'and Lord Kennedy, under pretence of being heir-male of the 'family.

'The petitioner, therefore, most humbly prays your Majesty, 'that you will be graciously pleased to declare and allow his 'right to the said titles and honours of Earl of Cassillis and 'Lord Kennedy, or give such directions therein as your Ma-'jesty in your great wisdom shall think proper.

'CASSILLIS, RUGLEN, & MARCH.'

'*Whitehall, March* 31*st*, 1760.

'His Majesty, being moved upon this petition, is graciously 'pleased to refer the same to the Right Honourable the House of 'Peers, to examine the allegations thereof, as to what relates to 'the petitioner's title therein mentioned; and to inform his Ma-'jesty how the same shall appear to their Lordships.

'HOLDERNESSE.'

Ordered, That the said petition and reference be referred to the Lords Committees for Privileges to consider thereof, and report their opinion thereupon to the House.

Then the Earl of Holdernesse (by his Majesty's command) presented to the House a petition of Sir Thomas Kennedy, relating to the same titles and honours, with his Majesty's reference to this House.

And the same were read by the Clerk, and are as follows:—

'To the King's most excellent Majesty, the humble
'PETITION of SIR THOMAS KENNEDY, Heir-Male
'of JOHN late Earl of CASSILLIS,

'*Sheweth*,

Nov. 2, 1404. 'That by a charter in 1404, Robert the Third, King of Scot-'land, granted the barony of Cassillis to Sir Gilbert Kennedy, 'and to James Kennedy, his son, and the heirs-male of his body; 'and, failing these, to several other heirs-male therein named.

Jan. 27, 28, 1405. 'That King Robert the Third soon after granted to the said 'James Kennedy, and to Mary Stewart, his wife, King Robert's 'daughter, and the same heirs-male mentioned in the former 'grant, the barony of Dalrymple; and appointed the said James 'Kennedy, and the heirs-male aforesaid, the head of the whole 'Tribe in all questions, articles, and affairs, thereto belonging.

Aug. 2, 1450. Feb. 18, $14\frac{50}{51}$. 'That his Majesty King James the Second, in 1450, not only 'confirmed the two last mentioned grants, but of new granted 'the barony of Cassillis in favour of Gilbert, the son of the said 'James Kennedy, and grandson of King Robert the Third, and 'the heirs-male of his body; and, failing these, to a series of 'heirs-male only.

'That the said Gilbert was soon after created Lord Kennedy; 'and in 1509, before patents were in use, his son, Lord Kennedy, 'was created Earl of Cassillis; since which time, for the space of '250 years, the estate and the title of honour and dignity of Earl 'of Cassillis have been held and enjoyed by the heir-male only 'of David, first created Earl of Cassillis in 1509.

'That by the law of Scotland, titles of honour, where there is 'no patent regulating the descent, are considered as male fiefs, 'and do invariably descend to the heirs-male of the first grantee, 'so long as any exist.

'That your petitioner, upon the death of John, late Earl of 'Cassillis, in August 1759, was, agreeable to the forms of the 'law of Scotland, duly served and cognosced to be the nearest 'heir-male of the said John, late Earl of Cassillis, and being 'lineally descended of David, the first Earl of Cassillis, he 'most humbly apprehends he is entitled to the title and honour 'and dignity of the Earl of Cassillis.

'The petitioner most humbly prays that the title and 'dignity of Earl of Cassillis may be declared to belong to 'the petitioner and his heirs-male.

'And your petitioner shall ever pray, &c.

'THOMAS KENNEDY.'

'*Whitehall, March* 31, 1760.

'His Majesty, being moved upon this petition, is graciously 'pleased to refer the same to the Right Honourable the House of 'Peers, to examine the allegations thereof, as to what relates to 'the petitioner's title therein mentioned; and to inform his Ma-'jesty how the same shall appear to their Lordships.

'HOLDERNESSE.'

Ordered, That the said petition and reference be referred to the Lords Committees for Privileges to consider thereof, and report their opinion thereupon to the House.

Ordered, That the said Committee do meet to consider the said petitions on Wednesday next.

2*d April* 1760.—The House was informed, 'That the Lords 'Committees for Privileges, to whom are referred the petition of 'William Earl of Cassillis, Ruglen, and March, relating to the 'titles and honours claimed by the petitioner, with his Majesty's 'reference thereof to this House: and also the petition of Sir 'Thomas Kennedy, Baronet, claiming the same titles and ho-'nours, and his Majesty's reference thereof, have met, and ap-'pointed Monday the 5th day of May to proceed on the consi-'deration of the said petitions.'

Ordered, That notice be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, of the said reference, and the time of the meeting of the said committee.

15*th April* 1760.—A petition of William Earl of March and Ruglen was presented, and read, setting forth, 'That the petitioner 'having applied by petition to his Majesty, praying to have his 'right declared to the titles and honours of Earl of Cassillis and 'Lord Kennedy, and Sir Thomas Kennedy having likewise by 'petition claimed the same titles and honours: his Majesty was 'graciously pleased to refer both petitions to this House, and the 'same having been by their Lordships referred to the Lords 'Committees for Privileges, the said Committee has appointed 'Monday the 5th day of May next for hearing both petitions. 'That the petitioner's agent in Scotland having been wrote to, 'to collect and transmit the evidence necessary to support the 'petitioner's claims, he, by his letters of the 5th and 10th instant, 'acquaints, that it will be impossible for him to have the neces-'sary searches made, so as to be prepared against the time ap-'pointed for the hearing; alleging, that the charter-room of Cas-'sillis must be searched, and all the many writings in it must be 'gone over with care: and that this room is now sealed up, and 'in custody of the law, and it will require weeks together to have 'that single piece of work done:' and therefore praying, 'that 'their Lordships will be pleased to put off the hearing of the said 'petitions till the above searches can be made.'

And thereupon the agents for both the said claimants were called in and heard at the bar.

And being withdrawn,

Ordered, That the said petition do lie on the table.

25*th April* 1760.—The House was moved 'To take into consideration the petition of William Earl of March and Ruglen, 'which was presented to the House and read the 15th instant, 'and then ordered to lie on the table: setting forth that the petitioner having applied by petition to his Majesty, to have his 'right declared to the titles and honours of Earl of Cassillis and 'Lord Kennedy; and Sir Thomas Kennedy having likewise 'by petition to his Majesty claimed the same titles and honours, 'his Majesty was pleased to refer both petitions to this House: 'and the same having been by their Lordships referred to the 'Lords Committees for Privileges, the said Lords Committees 'have appointed Monday the 5th day of May next for hearing 'the said petition;' and praying, for the reasons therein alleged, 'That the said hearing may be put off till proper searches can be 'made in Scotland for the evidence necessary to support the petitioner's claim.'

And thereupon the agents for both the said claimants were called in and heard at the bar.

And being withdrawn,

Ordered, That the hearing of the said claim, upon both the said petitions, before the Lords Committees for Privileges, be put off till Monday the 2d day of June next; and that his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, have notice thereof.

10*th February* 1761.–[In consequence of the demise of George II., accession of King George III., and the summoning of a new Parliament, it became necessary for the claimants to present petitions of new. This was accordingly done, and references made to the House of Peers, and by their Lordships to the Lords Committees; but as both the petitions and references are the same as those previously given, it is unnecessary to repeat them here.]

Ordered, That the said Committee do meet to consider the petitions on Wednesday the 4th day of March next, and that notice thereof be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland.

27*th February* 1761.—Upon reading the petition of William Earl of Ruglen and March, setting forth, 'That the hearing upon 'the petition of the said Earl and Sir Thomas Kennedy of Col-'zean, Baronet, severally claiming the titles and dignities of Earl 'of Cassillis and Lord Kennedy, before the Lords Committees for 'Privileges, being appointed for Wednesday, the petitioner, whose 'documents were only transmitted from Scotland last week, can-'not be so early prepared;' and therefore praying, 'That their 'Lordships would be pleased to put off the said hearing till Mon-'day the 9th day of March next.'

It is ordered, That the meeting of the Lords Committees for Privileges, to consider of the said petitions, be put off from Wednesday next to Monday the 9th day of March next, as desired, and that notice thereof be given to his Majesty's Attorney-General, and his Majesty's Advocate for Scotland.

26*th November* 1761.—Upon reading the petition of Sir Thomas Kennedy, claiming the title and dignity of Earl of Cassillis, setting forth, 'That the petitions in the behalf of William Earl of 'March, and the petitioner, severally claiming the title and dig-'nity of Earl of Cassillis, having been referred by his Majesty to 'this House, their Lordships, on the 10th day of February last, 'were pleased to refer the same to the Lords Committees for 'Privileges, to meet and consider thereof on Wednesday the 4th 'of March: That the consideration of the matter of the said pe-'titions was delayed from Wednesday the 4th to Monday the '9th of March last, but as some necessary writings founded on 'by the parties could not then be exhibited before the Commit-'tee, no further proceedings were had thereupon during the last 'session of Parliament.' And praying, 'In regard the said writ-'ings are now recovered, that their Lordships would be pleased to 'order, that the said petition and references may be taken under 'consideration on Wednesday the 9th day of December next, or 'any such other day as to their Lordships in their great wisdom 'shall seem meet.'

It is ordered, That the said petitions, with his Majesty's reference thereof, be again referred to the Lords Committee for Privileges to consider thereof, and report their opinion thereupon to

the House; and that their Lordships do meet to take the same into consideration on Wednesday the 16th day of December next; and that his Majesty's Attorney-General, and his Majesty's Advocate for Scotland, have notice of this order.*

## II.

## OLIPHANT PEERAGE,

### 11th July 1633.

[As the Oliphant Peerage has been so much relied on by the Earl of March, and so severely criticised by Lord Mansfield, the report by Lord Durie† has been appended. Notwithstanding Lord Mansfield's scepticism as to the case having been argued before Charles I., there can be little doubt on the point, and the following extract from a letter preserved in the Pollock charter-chest, from William Maxwell, advocate, to his cousin, Sir John Maxwell of Pollock, may be considered as pretty decisive proof on the subject:—"His Majestie to-morrow to heir a despitt, in the matter of the tytell of the Lord Oliphant, betwixt Sir James Douglas and the Lord Oliphant's brother's sone; Mr Lewis [Stewart] is for him, and Mr Thomas Nicolsone for Sir James and his ladie, quha is heir of lyne; and my Lord Advocate for the King. They have taken great paiues to prepair themselfis, swa that we think it sall be a creditable despitt." See "Remarks upon Scotch Peerage Law," by John Riddell, Esq. advocate. Edin. 1833, 8vo, p. 94, a most valuable work, in which many of the fallacies in Lord Mansfield's argument in the Cassillis case are pointed out.]

OLIPHANT *contra* OLIPHANT, *July* 11, 1633.

SIR James Douglas having married the only bairn and daughter of umquhile the last Lord Oliphant, and she being served heir-general to her immediate predecessor, who died before her said father, pursues *hoc titulo*, as heir to her said predecessor, Patrick Oliphant, nearest heir-male in bloud to her said father, for

* The remaining proceedings, so far as engrossed in the Journals, will be found at page 60.

† Decisions, p. 685. Edinburgh, 1690. Folio.

annulling a contract made betwixt him and her father, whereby he dispones all his lands, together with the title and dignity of the Lordship of Oliphant, to the said Patrick and his heirs-male, which failing, to return to the disponer and his heirs-male, containing a procuratory of resignation,—to hear and see it reduced, because it was a paction for honour, which is not *in commercio*, not being allowed by the Prince, *qui est fons omnis honoris*, and so is null, and the defender to be decerned to have no right to that title, and that the title pertains to the pursuer as nearest heir *in recta linea* to him, to whom that title belongs, notwithstanding of the said contract. The Lords considering, after that the parties' reasons were *hinc inde* heard, and at length dispute in presence of the Lords, that the pursuer had founded the pursuit upon her claim, as heir to her grandsir, and not upon any succession, as heir to her father, which father was served heir to the same person her goodsir, before his decease. Likeas her father had bruiked the title of Lordship during his lifetime, by ryding in Parliament, and by being designed in the infeftment of his lands, granted to him by the King (his cousin) with the title of Lord Oliphant, and by doing of all other acts, whereby it might appear that he was Lord Oliphant, there being no writ more extant, nor patent, to show any erection of it in a Lordship, or whereby he or his predecessors were created Lords, but only the custom foresaids, and such acts as is before mentioned. They found, that this use was enough, conform to the laws of this realm, to transmit such titles in the heirs-female, where the last defunct had no male children, and where there was no writ extant to exclude the female. And because, by the contract foresaid, the pursuer's father had disponed the title to the defender, *ut supra*, in the which there was a procuratory of resignation, albeit the king had not conferred the honour according thereto. The Lords found that the pursuer had no right to claim this honour, in respect her father was last possessor, and died in possession, by the acts foresaid, (there being no seasin requisit for the title thereof,) and therefore seeing her father had disponed the same, as said is, she could never misken him, who behoved to be repute as *in tenemento*, and pass to her grandsir in an higher degree, to eschew the deed of her father, whose deed she behoved to warrand, if she pursued as heir to him, or by right competent to her as nearest to him, and therefore the Lords excluded this pursuer, as not hav-

ing right to this dignity, seeing the King had not conferred the same upon her, and that her father, as said is, by the foresaid contract, had renounced his right thereof, which albeit it was not found by the Lords to be a sufficient right, to establish the honour in the person of the defender, which no subject can dispone, without the approbation of the Prince, which being acquired, then the act convalesces: Yet it was found enough to denude himself, and his descendants, ay and while the Prince should declare his pleasure, and either confer the honour on the pursuer or defender, at which time the act would take perfection. And in the mean time, seeing the Prince had not interponed himself to allow any of these acts, They found, that none of the saids parties could claim the said honour, but it remained with the King, which he might confer to any of them he pleased: For albeit honour be not annailziable by buying and selling, yet the Lords found, that the party having it might quite his own interest, which albeit it would not avail him in whose favours he had done it, unless the Prince should allow it, yet it was enough to denude him as said is. Actor. Nicolson. Alter. Stuart. Advocatus for the King present.*

## III.

### DECISION IN THE QUESTION OF PRECEDENCY,

### THE EARL OF SUTHERLAND *v.* EARL OF CRAWFORD.

JAN. 23, 24, 25, 1706.

[As Lord Mansfield quotes a passage from the argument of the Earl of Crawford, p. 59, as the grounds of decision in the question of precedency between the Earls of Sutherland and Crawford, the judgment of the Court, as given by Forbes, is here subjoined. A brief note of the pleas is necessary, however, to make it intelligible.

Lord Crawford contended, amongst other things, that he had prescribed a right of precedency to Lord Sutherland, by the decreet of

* This decision, notwithstanding the attack upon it by Lord Mansfield, is clearly a sound one.

ranking in the year 1606, and by possession under it for a century—as also by immemorial anterior possession. He further asserted, that this decreet was *res judicata*, and that, moreover, the old dignity of Sutherland was "interrupted" by the marriage of Elizabeth, the heiress of the family, with Adam Gordon. Lord Sutherland answered, that titles of honour cannot be acquired by prescription—that the decreet in 1606 did not operate as *res judicata*, but was merely an interim regulation—that granting the decreet was a competent title, still prescription, could only commence running from the date of the act 1617, and not of the decreet 1606—that there had been sufficient interruption by summons in the year 1630; and by protestations in Parliament 1641, 1647, 1661,—that Elizabeth succeeded to the ancient title as heiress, and was in her own right Countess of Sutherland.]

THE Lords found, That the citation at the Earl of Sutherland's instance against the Earl of Crawford, in the year 1630, was not renewed in the terms of the act 15, Parliament 1685, by the remit of Parliament 1693, in respect the same is not within seven years of the date of that act, the 13th of May 1685, and eleven months and fifteen days more allowed to be deduced in short prescriptions, conform to the act 40, Parliament 1690: and, therefore, the said citation can import no interruption of prescription. But found, that protestations made in Parliament are legal interruptions of prescription of precedency: and the prescription of 40 years doth commence from the act of Parliament 1617, and not from the date of the ranking in anno 1606: and found the Rolls of Sederunts of Parliament, not to be a sufficient document of the Earl of Crawford's possession of precedency to the Earl of Sutherland, when both were marked present. And found that the descent of the dignity by propinquity of blood from William Earl of Sutherland, who married King David's sister, to Earl John, who succeeded in 1512, is sufficiently instructed: but that the dignity was not conveyed from him with the estate to his sister Elizabeth.*

* Journal of the Session, by William Forbes, Advocate. Edinburgh, 1714. Folio. Page 85.